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EVIDENCE AS TO CHARACTER.

[FROM THE LONDON LAW TIMES.]

There are three modes in which character might possibly be put in evidence with a view to raise a presumption as to a man being innocent of a crime charged against him; first, by giving testimony as to previous acts of the accused under somewhat similar circumstances to those of the act in question; secondly, by persons who have had opportunities of forming an opinion as to the disposition of the accused, testifying the result of their experience; and, thirdly, by the testimony, not of the witness's own estimate of the accused, but of the estimate in which he is held by the community amongst whom he has lived and with whom he has mingled. The first of these modes, evidence of specific acts, has never been tolerated in our courts. Nothing could be more unfair to prisoners, according to every English idea of criminal jurisprudence, because, on the one hand, the evidence that a man had on one or two occasions not committed a felony, would go a small way to raise a presumption of innocence; and, on the other, if, as would be necessary, similar evidence was to be allowed to the prosecution, proof of one or two previous transgressions would create such a violent prejudice against the prisoner, that in many cases conviction would depend much more on the nature of the antecedents of the accused, than on the proof of the commission of the crime charged. Moreover, the endeavor to substantiate or disprove the various acts alleged, would incur the issue to be tried with such labyrinths of doubtful and collateral questions, as to insure the hopeless embarrassment of juries and endless prolongation of trials.

Endeavors have been frequent to bring to bear on the question of guilt or innocence the opinion formed by individual witnesses as to the character of the accused. Indeed, such evidence is practically often given in all courts. The questions generally asked of a witness to character are: "How long have you known the prisoner?" "What is his character?" And in reply, nine times out of ten, the witness gives the result of

his own experience. Yet it is clearly settled that no such evidence can be given. "Character," said Lord ERSKINE in *R. v. Hardy*, 24 St. Tr., 1079, "is the slow spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence." So in *Reg. v. Turner*, 10 Cox, C. C., 31, Lord COCKBURN says: "I find it uniformly laid down in the books of authority that the evidence to character must be evidence to general character in the sense of reputation." And in *Reg. v. Rowton*, 34 L. J., 57 M. C., the point came expressly to be decided under the following circumstances: A schoolmaster was charged with committing an indecent assault upon one of his scholars; evidence was called to character on his behalf, and similar evidence was called against him by the prosecution in the person of a witness who had formerly attended the prisoner's school. In reply to the question as to the character of the accused the witness said: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinions of others who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." Here, then, the issue between the reception of evidence of the second and third classes into which it has above been divided, was sharply raised. The witness distinctly disclaimed his ability to testify to the general estimate formed of the prisoner's character by the circle in which he moved, but volunteered the opinion which was the outcome of his own acquaintance with him. This evidence the court for Crown Cases Reserved held, by a majority of eleven to two (ERLE, C. J., and WILLES, J., being the dissentients), could not be received. In giving their judgments, however, the holders of the prevailing opinion emphasized the fact that they felt themselves coerced by the stream of authority, and took care to guard against any expression of approval of the rule which they enunciated; indeed, the

pains taken by them to plant their decision firmly behind the entrenchment of authority without any expressions of approval, lead strongly to the inference that they saw little to admire in a rule for which they, sitting as a court of ultimate appeal, could find no foundation in reason or equity. On the other hand, the two dissentient judges adduced weighty arguments for admitting a witness's testimony as to his estimate of the character of the accused derived from experience, and felt so convinced by the cogency of those arguments, that they were prepared to do away with the rule, and allow the impeached answer. There can be little doubt that, if the matter were a *res nova*, the rule would be made in conformity with their opinion.

The evidence of reputation which consists in a witness stating not what he himself knows of the prisoner's character, but what he has heard concerning it, is an authorization in that particular instance of that kind of testimony generally most abhorrent to our rules of evidence—namely, hearsay. The witness finds out what a certain number of gossips or tattlers say, or what he thinks they said, in idle moments, and retails this to the court. This hearsay is likely to be of the most partial kind, since, if the witness has been a known friend of the prisoner, he is very unlikely to have been made the repository for sinister rumors, and, if an enemy, he has in all probability been the confidant of every calumnious and slanderous whisper; so that in a small society, much given to cliqueism, two witnesses might well be brought forward, one whom might truly swear that he never heard anything against the accused, which in the opinion of Chief Justice ERLE (10 Cox C. C. p., 33), is the best character a man can receive, and the other, with equal veracity, might swear that the reputation of the accused was very bad. It is, too, the most unsatisfactory kind of hearsay conceivable, because there is no rule as to the proportion of opinions from which general reputation is to be assumed. If the witness had heard two persons give their opinion that the accused was untrustworthy, he might swear that the prisoner bore a bad character, even though those two persons were engaged in an intent to traduce. Indeed, the cruel injustice which the rule is capable of working is, perhaps, most apparent from the consideration that it is only requisite for malice, before commencing a prosecution, to be sufficiently successful in spreading calumnies to rob its victim of the benefits he might derive from the most untarnished reputation. Again, the exclusion of direct and allowance of hearsay evidence of reputation has sometimes the effect of shutting

out the most convincing support which a career of integrity can give to innocence, and possibly the still more extraordinary result of compelling a witness to depose to what he has the best reason for knowing not to be a fact. If, for instance a servant is indicted by a new master for dishonesty, in the absence of direct proof of guilt or innocence, the testimony of a former master that he had for many years served him with conspicuous probity would undoubtedly be the most satisfactory evidence to character producible; but the master may be quite unable to speak to general reputation, and so the servant is deprived of what would be the most conclusive testimony in his favor, for the very reason that it consists in experience and not in hearsay. On the other hand, suppose the witness to have an absolute knowledge that the prisoner has previously committed offenses similar to that charged, if the prisoner has been sufficiently adroit and hypocritical to keep up appearances among his neighbors and to hoodwink them into the belief that he is an upright man, he will receive the benefit of his duplicity, and the witness who knows to the contrary will have to deliberately deceive the court and judge, by deposing to his good character.

Surely, in the common sense conduct of affairs, there would not, be a moment's hesitation whether, in investigating the character of a man, to place more independence on a deliberate opinion formed as the result of personal contact and experience, or on a recollection of the random utterances of an indefinite number of persons who may never have seen the object of their garrulity, nor have had the remotest opportunity of forming a judgment upon his merits. The reception of such evidence would not be open to the decisive objections urged against previous acts of the accused being adduced, because the only questions admissible would be as to the means of knowledge of the witness, and the deduction he drew from those means of knowledge concerning the disposition of the accused. Here there would be occasion neither for wrangling over disputed facts, nor for the prejudice inseparable from taking for granted that a previous similar offense has been committed by the accused.

We may, perhaps, be permitted to suggest that in a careful perusal of the judgments in *Reg. v. Rowton*, sufficient justification might be found for inserting in the forthcoming criminal code a section devoted to the subject of evidence to character, so altering the rule relating thereto that, if such evidence is to be retained at all, we may have it for the future the best instead of the worst possible of its kind.

Supreme Court, Penn'a.

PALMER v. GILLESPIE.

In order to toll the running of the Statute of Limitations it is not essentially necessary that there should be an actual or express promise to pay. From an admission consistent with a promise to pay the law will imply a promise without its having been actually or expressly made.

Such an admission must be such a clear, distinct, and unequivocal acknowledgment of a particular debt as to remove hesitation in regard to the debtor's meaning. *Miller v. Baschore*, 2 Norris, 356, commented upon and modified.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Debt, by John J. Gillespie against Robert H. Palmer.

Upon the trial, before COLLIER, J., the defendant admitted that he was indebted to the plaintiff in the sum of \$750, but claimed to have a set-off to the whole claim as follows: About January, 1865, Gillespie was raising a fund to buy some oil land. The title to the property was to be taken in Gillespie's name, who should hold in trust for the contributors according to the amounts respectively contributed. Palmer, the defendant, contributed thereto \$750 in two installments, one of \$500, the other of \$250. One piece of property was purchased and held by Gillespie in his own name for several years. It did not clearly appear from the testimony how much, if any, of Palmer's money was invested. Palmer testified that about 1870 or 1871 he inquired of Gillespie about it, and that Gillespie said: "He didn't think I was in it at all. Said he would look at the papers. * * * He afterwards informed me that there was not enough to go around. I told him I wanted him to settle with me. * * * He said he would settle it, but he thought he could buy me a share of equal value of a man that would come in. I let it go. I afterwards asked him about the man's coming in. He said that he hadn't come in, but he expected him, that he would settle it, would pay it, would see to it, that it was correct. First he said he didn't think the receipts were written by him, didn't think I had a receipt for it, and when I brought the receipts to him he said he would pay it, would settle it." Gillespie testified that he was not certain as to how much of Palmer's money had been invested; that the question has been referred to a third party but had never been decided; that more money had been paid in than was necessary for the purchase and that some had been paid back. He expressly denied the conversations testified to by Palmer.

The plaintiff submitted, *inter alia*, the following point: "That even if the jury believe from the evidence that Mr. Palmer, the defendant, gave to the plaintiff \$750 to be invested, together with moneys of other parties, in real estate, which the said Gillespie was to hold in trust for said defendant and others, in proportion to the amounts of money by them respectively contributed to the purchase money, and if the jury believe that the plaintiff took title to said property and recognized the interest of defendant therein, but that when making a subsequent conveyance to another trustee a dispute arose as to the quantum of interest in the property belonging to the defendant, such state of facts gave the defendant no right to recover back his purchase money or any part thereof, nor is such defense available by way either of payment or set-off in this present action." *Affirmed.*

The court in its general charge said, *inter alia*, as follows: "Then there is another matter, even if the proposition of the defendant is true. This transaction was more than six years before the bringing of this suit. It is necessary that Mr. Gillespie should make an actual promise to pay within the six years, should admit it, and say he would pay it before the defendant would be entitled to a verdict." * * * "Now, the transaction being more than six years old at the time of the bringing of this suit, unless there was a promise to pay, it would not avail."

Verdict and judgment for the plaintiff. The defendant took this writ, assigning for error the answer to plaintiff's point and the above portion of the charge of the court.

For plaintiff in error, *West McMurray, Esq. Contra, Messrs. Hampton & Dalzell.*

Opinion by MERCUR, J. Filed November 8, 1880.

This contention relates to the allowance of a set-off claimed by the plaintiff in error. His right thereto is alleged to have arisen on this statement of facts. A purchase of oil lands was contemplated, in which both these parties and some others should be interested. The purchase was to be made in the name of the defendant in error; but in fact for the benefit of all who contributed towards the purchase money, according to the amount subscribed by each respectively. The plaintiff in error testified that for this purpose, he put \$750 into the hands of the defendant in error; but the latter did not so invest it, and afterwards promised to pay it back to him. Evidence was given tending to show that one piece of land was purchased by him and deed therefor taken in his name, and that he afterwards conveyed the same to one Hailman,

without declaring any trust therein for the plaintiff in error. Whether any right of the latter in the land was then recognized to exist, is a question in dispute. It seems, however, if any was recognized, it was not equal to the whole \$750. This sum had been advanced by the plaintiff in error in two installments. The first of \$250, the latter of \$500.

This suit was brought more than six years after the money was thus advanced. To avoid the effect of the Statute of Limitations, the plaintiff in error relied on promises or admissions of indebtedness, alleged to have been made within the six years. The learned judge charged substantially, that notwithstanding the defendant in error may have kept this money, and did not invest it in the oil property, yet as that was more than six years before suit brought, to make him liable, it was necessary that he "should make an actual promise to pay within the six years; should admit it, and say he would pay it" before he would now be liable therefor. Again he charged "now the transaction being more than six years old at the time of the bringing of this suit, unless there was a promise to pay it, it would not avail." In so charging, we think the learned judge erred. It is not essentially necessary that the promise be actual or express, provided the other necessary facts are shown. A clear, distinct, and unequivocal acknowledgment of a debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise without its having been actually or expressly made. There must not be uncertainty as to the particular debt to which the admission applies. It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning: *Fries v. Boisselet*, 9 S. & R., 128; *Bailey v. Bailey*, 14 Id., 195; *Allison v. James*, 9 Watts, 380; *Gilkyson v. Larue*, 6 W. & S., 213; *Hazlebaker v. Reeves*, 2 Jones, 264; *Davis v. Steiner*, 2 Harris, 275; *Johns v. Lantz*, 13 P. F. Smith, 324. In this last case, it was said by the present Chief Justice: "No case, however, has ever gone the length of saying that there must be an express promise to pay in terms:" *Watson's Executors v. Stern*, 28 Id., 121, and *Senseman et al. v. Hershman et al.* 1 Norris, 83, declare the rule to be as stated in the cases we have cited.

Miller v. Baschore, 2 Norris, 356, was not intended to overrule the long line of preceding cases. The generality of the language therein used must therefore not be understood as requiring an express promise, but a promise that may be clearly implied. The rule as held in

the other cases cited was approved and declared in *Rider v. King*, decided last spring at Harrisburg.

Inasmuch as the jury might find under the evidence, that at least one part of the money was in fact never invested in land, the language covered by the first assignment may have been calculated to mislead them. It appears to assume that both sums should be held as one payment. The evidence bearing on each ought to be separately presented to the jury. This can be done on the next trial.

Judgment reversed and venire factas de novo awarded.

COMMONWEALTH, to use of PRICE, v. HAINES et al.

The certificate of a notary public of the acknowledgment of a deed or mortgage is a judicial act.

The notary, who has been imposed upon by a personation, is liable only for a clear and intentional dereliction of duty; and in the absence of such evidence he is protected by the legal presumption that he did his full duty.

A mere mistaken conclusion imposes no liability on him.

Error to the Court of Common Pleas, No. 2, of Philadelphia county.

Opinion by MERCUR, J. Filed May 2, 1881.

This action was against a notary public and his sureties on his official bond. The complaint is that he certified to one Abram P. Beecher having personally appeared before him, and, in due form of law, acknowledged a certain indenture of mortgage to be his act and deed, when in fact the person who appeared before him and made the acknowledgment was not Abram P. Beecher, whereby said plaintiff was injured.

The plaintiff called Abram P. Beecher, who owned the lot described in the mortgage on which the notary made the certificate. He testified that this mortgage was not executed by him, nor by his authority, and that he never made any acknowledgment thereof, or of any mortgage on that property before the notary, or before any person.

The plaintiff testified that, relying on the supposed validity of the mortgage and the record thereof, he bought and paid for the mortgage.

The question to be considered is, what proof is necessary to make the notary legally liable to one injured by the making of such certificate untrue in fact.

It is well settled that the certificate of a judge, or of a justice of the peace, of the acknowledgment of a deed or mortgage is a judicial act: *Withers v. Baird*, 7 Watts, 227; *Jamison v. Jamison*, 3 Whar., 457; *Heeler v. Glasgow*, 29

P. F. Smith, 79; *Singer Manufacturing Co. v. Rook*, 3 Norris, 442.

Conceding such to be the effect of a certificate of a judge or justice, yet it was contended, on the argument, that like effect should not be given to the certificate of a notary. Why not? He is a public officer, commissioned by the Governor. He is acting under oath, like other officials in the performance of judicial duties, to "well and faithfully perform the duties of his office." The second section of the Act of 10th of August, 1864, Pur. Dig., 1097, expressly gives power to "each notary public of this Commonwealth," *inter alia*, "to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages, or other instruments of writing, touching or concerning any lands, tenements or hereditaments situate, lying and being in any part of this State, * * * as fully to all intents and purposes whatsoever as any judge of the Supreme Court, or president or associate judge of any of the Courts of Common Pleas, or any alderman or justice of the peace within this Commonwealth." As then the notary is authorized to take the acknowledgment as fully, to all intents and purposes, as a magistrate can do, it follows the same effect should be given to his certificate of acknowledgment. It was so held in *Hornbeck v. Building Association*, 27 PITTSBURGH LEGAL JOURNAL, 9. Whatever officer is authorized to take the acknowledgment, to him is given a judicial duty, and when he performs it becomes a judicial act, and has the effect of a record.

This action, then, is to recover damages flowing from the incorrect manner in which the defendant performed a judicial act. The rule as to the liability of an officer performing a ministerial duty does not apply.

The plaintiff also called and examined the defendant notary. He testified that at the time of putting his hand and seal to the acknowledgment he did not know Abram P. Beecher; did not remember that he had ever seen or heard of him before; had no knowledge of the matter, except what appears on the acknowledgment; frequently some whom he knew brought in the person and introduced him; he was satisfied at the time it was all right; but does not remember what took place. He added, "the paper was undoubtedly signed before me; I don't remember that I did or did not take any precaution to identify the person making the acknowledgment; but I know I must have been satisfied at the time." The substance of his evidence, therefore, is that, while he does not recollect what inquiries or statements were made, yet he knows he must have been satisfied

as to the identity of the person, and that it was all right at the time the acknowledgment was taken. No evidence was given conflicting with or impairing this evidence of the defendant. The legal presumption is he acted on reasonable information, and did his full duty. His absence of memory as to the details of what occurred does not destroy that presumption. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty; this is neither proved nor averred. A mere mistaken conclusion imposes no legal liability on the defendant.

The learned judge was clearly right in ordering a compulsory non suit and in refusing to take it off. *Judgment affirmed.*

For plaintiff in error, *John G. Johnson, Esq.*
Contra, Messrs. Jos. M. Pile and R. C. McMurtrie.

THE CHURCH OF OUR SAVIOUR v. MONTGOMERY COUNTY.

A parsonage, though erected on ground appurtenant to a church, but not a part thereof, cannot be considered as an actual place of religious worship, and is not exempt from taxation by Art. 9, Sec. 1, of the Constitution of 1878.

Error to the Court of Common Pleas of Montgomery county.

This was an amicable action and case stated, in the court below, for the opinion of the court, wherein the County of Montgomery was plaintiff, and the Rector, Church Wardens and Vestrymen of the Church of our Saviour, a corporation duly chartered, was defendant.

The case stated showed that the Church defendant is of the Protestant Episcopal denomination; that its revenues are derived exclusively from voluntary contribution, its pews and sittings being free, and that the rector, besides his annual salary, is allowed, as a further consideration for his services, to occupy the parsonage, next named, free of rent; that the lot of the defendant contains two acres and twenty-nine perches of land, upon which are erected the church edifice, a building used for the Sunday school of the parish, and a parsonage or rectory erected for the residence of the rectors of the congregation; that this lot surrounds the church edifice, forming one unbroken and undivided lot; that the parsonage has never been used for any other purpose than for the residence of the rector for the time being; and that no portion of these lands or buildings is rented, or used for any purpose not germane to the corporate objects of the defendant. The question was submitted to the court whether the parsonage was liable to taxation.

The court below, Ross, P. J., entered judgment for the plaintiff, filing the following opinion:

"The Constitution of 1873, in section 1, article 9, provides, that 'all taxes shall be uniform upon the same class of subjects within the territorial limits levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of public charity.' This is certainly mandatory and may not be evaded. The Legislature is absolute on the subject of taxation, except as far as it is limited by constitutional restraint. State constitutions are limits on legislative power, whereas the Federal Constitution is a devolution of power: *Hammitt v. Philadelphia*, 15 P. F. S., 156, per SHARSWOOD, J.

"The citation of this section would seem to be conclusive. 'Actual places of religious worship' is a distinct phrase, clearly restrictive upon the legislative power of exemption.

"But the case is clear of all difficulties, if indeed the language can be considered questionable, when we examine the authorities which construe former legislation upon this subject. The Act of 1838 provides that all churches, meeting-houses, or other regular places of stated religious worship, with the grounds thereto annexed for the better enjoyment of the same * * are hereby exempt from all and every county, etc., tax: P. L., sec. 29, p. 525. Under this most liberally framed legislation the courts adopted a strict construction; and, after the passage of the Act of 1839 limiting the ground referred to in this legislation to five acres, PEARSON, J., in 3 Philadelphia R., 109, after reviewing all the cases, ruled that an Episcopal parsonage, belonging to an Episcopal church, is subject to taxation, when not locally annexed to the church edifice, on its curtilage.

"It may be that this parsonage would be within the saving clause of this opinion, under the Acts of 1838 and 1839. But when the new constitution is examined in the light of this authority, and in the still broader and clearer light of its own text, the question is clear of all doubt. An actual place of religious worship is clearly a church; and nothing but a church building, unless a graveyard be attached thereto, is now exempt; a parsonage or a rectory, or a dwelling house, which has the wall of the church as its party wall, is outside of the exempting clause in the constitution.

"If a dwelling house form an integral part of

the church building, so that the existence of the one depends upon the preservation of the other, the case might vary; but wherever there is no physical annexation, and the church building, as an actual place of worship, has a distinct existence from the residence of the priest, rector or minister, the house in which the latter lives and its curtilage are taxable.

"Of this we think there can be no doubt, unless the disturbance of the one involves the disintegration of the other; and, therefore, judgment must be entered for the plaintiff."

The defendant thereupon took this writ of error.

For plaintiff in error, *Messrs. Geo. Harrison Fisher and Richard S. Hunter.*

Contra, *George W. Rodgers, Esq.*

PER CURIAM. Filed April 1, 1881.

Upon the most liberal interpretation to be given to the ninth article, sec. 1, of the constitution, we do not think that a parsonage can be considered as an actual place of worship, though erected on grounds appurtenant to a church, but not a part thereof.

Judgment affirmed.

HARBERGER'S APPEAL.

The Orphans' Court have no power to compel an executor to give ball until letters have been granted to him; it is only after that time, and for the causes specified in the Act of Assembly, that the court may dismiss him or require him to give ball.

If the party named in the will as executor be an inhabitant and citizen of the State, the court cannot require him to give ball; the fact that he resides in another county than that from which the letters issued does not empower the court to exact ball from him.

Certiorari to the Orphans' Court of Lancaster county.

Opinion by GORDON, J. Filed June 14, 1881.

The appellant's right to letters testamentary was received not from any Act of the Legislature, but from the will of his mother, Mrs. Harberger, and to these letters he was entitled without regard to his pecuniary circumstances. As his mother had a right to devise to him the whole of her property, had she been so disposed, so had she the right to commit to him the charge of it, in whole or in part, as to herself might seem proper, and this right no one can be permitted to call in question.

It is only after letters have been committed to an executor that the Acts of 29th of March, 1832, and of May 1, 1861, become operative; and, until that time, the Orphans' Court has no jurisdiction either to control the issuing of letters to him, or to compel him to give bail.

After that time, for any of the causes specified in the act, and for none other, the court may

dismiss him, or require sureties for the proper administration of the estate committed to his charge: *Cohen's Appeal*, 2 Watts, 175; *Webb v. Dietrich*, 7 W. & S., 401.

Whilst, therefore, the court below did that which was proper in refusing to vacate the letters testamentary, issued by the register to the appellant, Louis B. Harberger, it did wrong in imposing upon him the giving of a bond conditioned for the faithful performance of his duties as executor. Such an order can only be imposed upon one "not being an inhabitant of this Commonwealth," who claims the right to act as executor, but not upon one merely resident in a different county from that from the register's office of which the letters testamentary must issue. If the executor indicated by the will be an inhabitant of the State he is relieved from the necessity of giving a bond, and for this reason the decree of the Orphans' Court must be reversed.

It is now ordered and decreed that that part of the decree of the Orphans' Court, requiring Louis B. Harberger to give an approved bond in the sum of \$25,000, be reversed and set aside, and that that part of said decree which directs the register to issue letters testamentary to the said Harberger be affirmed. And it is further ordered that the appellee pay the costs of this appeal.

For appellant, *Messrs. H. B. Swarr, H. M. North and J. J. Murphy.*

Contra, J. L. Steinmetz, Esq.

McCORT'S APPEAL.

Under the Act of 1856 the probate of a will devising real estate is conclusive as to such real estate unless, within five years from the date of the probate, those interested shall contest it by *caveat* and *action at law*. The words "*caveat and action at law*," as used in this act, mean the beginning and ending of the process by which the register's decree is to be controverted.

The right to contest the will seems to be limited to those who may be interested to controvert the probate, and this on the hypothesis that the will, after probate, can only be attacked by a contest over the decree admitting it to proof.

Certiorari to the Orphans' Court of Lancaster county.

Opinion by GORDON, J. Filed June 14, 1881.

The will of Daniel McCort relates to and disposes of his real as well as his personal property, and, so far as it does relate to realty, it is subject to the provisions of the Act of the 22d of April, 1856. Hence, the court erred in striking off the appeal from the register's sentence or decree, entered by the appellant on the 13th of November, 1880.

The act referred to makes the decree of the

register, before whom probate of any will devising real estate is made, "conclusive as to such realty, unless within five years from the date of such probate those interested to contest it shall, by *caveat* and *action at law*, duly pursued, contest the validity of such will as to such realty." Three things herein stated require our notice: (1) The judicial and conclusive character of the register's decree. (2) The fact that five years is given within which to controvert such decree and contest the validity of the will. (3) That the act is limited to a devise of realty; hence it in no way affects the probate of a will so far as it concerns personal property. As to the limitation, as found in Act of 1832, continues to apply.

Now, as we endeavored to show in the case of *Wilson v. Gaston*, 27 PITTSBURGH LEGAL JOURNAL, 125, in order to harmonize this incongruous statute with itself, and give it the force obviously intended by the Legislature, we are obliged to construe the words "*caveat and action at law*" as the beginning and ending of the process by which the register's decree is to be controverted. Without an interpretation such as this, we make the statute one of limitation only; we refuse to the sentence of the register the force of a judicial decree; we must strike out the word "*caveat*" as meaningless; repudiate the idea of a controversy involving the sentence of probate, and limit the contest to an action at law, which may involve the issue *devisavit vel non*. Yet it is obvious that the framer of the act had all the while in his mind a contest over the validity of the probate; for such probate shall be conclusive, unless those "interested to controvert it" shall, by *caveat*, etc., contest validity of such will. From this it would seem clear that the right to contest the will is limited to those who may be interested to controvert the probate. This, however, can have force only on the hypothesis that the will, after probate, cannot be attacked except by a contest over the decree admitting it to proof. We can, indeed, readily imagine a case, as that of a purchaser after such decree, who may have no interest whatever in the probate, and is yet interested to contest the will.

How, then, is all this to be harmonized and reconciled? Certainly only by the construction recognized in *Wilson v. Gaston*; that is, by making all persons who may, within the five years, happen to be or become interested in the will, interested also in the probate. In this way no right, unless, perchance, it be one purely technical, is taken from any person, and, at the same time, the provisions of a valuable statute are saved.

We conclude, therefore, that under the Act of 1856, though it might be different, did the Act of 1874 apply to this case, the appeal of the appellant, being within five years from the date of the probate, was in time, and the court ought not to have stricken it off.

The decree of the Orphans' Court is now reversed at the costs of the appellee, the appeal of the appellant reinstated and a *procedendo* awarded.

For appellant, *Messrs. H. M. North, J. W. F. Swift and M. Brosius.*

Contra, Geo. Nauman, Esq.

HEIDELBAUGH v. THOMAS.

Subsequent judgment creditors of the defendant are not such persons as are described as those "concerned in interest" in the Act of May 14, 1876, relative to satisfaction of judgments.

This act being in derogation of the common law, and a denial of the right of trial by jury, must be strictly construed.

Error to the Court of Common Pleas of Lancaster county.

Opinion by STERRETT, J. Filed May 31, 1881.

The proceedings which resulted in the order of court directing the judgment of plaintiff in error against Arthur Thomas to be marked "satisfied of record," were based on the petition of George M. Steinman & Co., subsequent judgment creditors of said Thomas, presented under the Act of March 14, 1876; and the only question is whether, under the provisions of the act, the petitioners had a right to commence and prosecute such proceedings.

That act provides that any court of record, having jurisdiction of a judgment entered therein, originally or by transfer, from any other court, "shall, upon application by the defendant or defendants in the said judgment, or his, her or their legal representatives, or other person or persons concerned in interest therein," setting forth that the same has been fully paid, grant a rule to show cause why the judgment should not be marked satisfied of record; and, if it shall appear to the satisfaction of the court that the judgment has been fully paid, "as set forth in the application of the defendant or defendants, the court shall then direct the prothonotary to mark such judgment satisfied of record," etc. (P. L., 78). If, within the true intent and meaning of the act, the petitioners are "persons concerned in interests" in the judgment, application was rightly entertained by the court; and, inasmuch as the evidence was sufficient to justify the order of satisfaction, it would follow that the same was properly made. But we are of opinion that the class of persons

described as "concerned in interest" in the judgment does not include subsequent judgment creditors of the defendant, and therefore the petitioners had no standing in court.

The summary power conferred by the act is in derogation of the common law, and virtually a denial of the right of trial by jury. It should, therefore, be strictly construed, as was held in *Gifford's Appeal*, 9 W. N. C., 246. Perhaps, in an enlarged sense of the phrase, it may be said that a subsequent judgment creditor is "concerned in interest" in prior judgments against his debtor, in that the value of his security may be more or less affected by such antecedent liens, but his interest is not of the direct nature that is contemplated by the act. It differs from that of the defendant in the judgment, or his legal representatives, who are expressly named in the act. The interest of a *terre-tenant* of land, bound by the judgment, or of bail for stay of execution, is also different from that of a subsequent judgment creditor. The latter is not responsible, either in person or estate, for the payment of the judgment, but the others are; and in that respect their position is akin to that of the defendant. It may be fairly inferred that the persons described as "concerned in interest therein," are those only whose relation to the judgment is similar to that of the defendant—a relation of liability either in person or estate. By limiting the operation of the act to the defendant, his legal representatives and others, who are personally responsible for the judgment, or whose property is exposed to execution in satisfaction thereof, full force and effect is given to the language of the statute, and the legislative intent will be carried out. If the Legislature had intended to include creditors they would have said so in express terms.

The phrase, "persons concerned in interest therein," appears to have been borrowed from the fourteenth section, the original act relating to the satisfaction of judgments, passed in 1791 (Purdon 824, pl. 26). It has never been claimed that subsequent judgment creditors are within the provisions of that act. Nor is there any reason why they should be considered as included in the Act of 1876. Ample provision for their protection exists in proceedings for distribution. All questions touching the payment of prior judgments may be there raised and determined.

The order and decree of the Court of Common Pleas is reversed, and the petition of George M. Steinman & Co. is dismissed with costs.

For plaintiff in error, *Philip D. Baker, Esq.*

Contra, Messrs. H. M. North and A. J. Steinman.

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CONCLUSIVE EFFECT OF JUDGMENTS.

[A. L. MERRIMAN, IN CENTRAL LAW JOURNAL.]

In the case of *Trockmorton v. United States*, 98 U. S., 615, the court uses the following language: "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicae sit finis litum*, and *nemo debet bis vexari pro una et eadem causa*."

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for new trial will give appropriate relief. But all these are parts of the same proceeding; relief is given in the same suit, and the party is not vexed by another suit for the same matter. But there are admitted exceptions to this general rule—cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case—when the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced upon him by his opponent, as by keeping him away from court, or false promises of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or when the attorney regularly employed corruptly sells out his client's interests to the other side. These and similar cases which show that there never has been a real contest in the trial, or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul a former judgment or decree, and open the case for a new and fair hearing." Wells' Res Adjudicata, sec. 499; *Pearce v. Olney*, 20 Conn., 544; *Weirich v. DeZoya*, 7 Ill., 385; *Kent v. Richards*, 3 Md. Chy., 392; *Smith v. Lowry*, 1 Johns. Ch., 320; *DeLouis v. Mark*, 2 Iowa, 55. This subsequent proceeding is necessary, where by rules and practice of the law of courts, the ordinary motion for new trial cannot be entertained in the court in which the judgment was rendered in a court of equity; for, after the period has elapsed in which the court

rendering judgment could grant the appropriate relief, a court of equity alone can do so, even in cases of fraud: *Christmas v. Russell*, 5 Wall., 290.

"On the other hand" (the court say in the case of *Throckmorton v. United States*, *supra*), "the doctrine is equally well settled, that the court will not set aside a judgment because it was founded upon a fraudulent instrument, or perjured evidence, or for any matter which was actually considered in the judgment assailed." Wells' Res Adjudicata, 499; Bigelow on Frauds, 170-172; *Tovey v. Young*, Prec. Chy., 193; *Bateman v. Willoe*, 1 Schoale & Lefroy, 291; *Dixon v. Graham*, 16 Iowa, 310; *Cottle v. Cole*, 20 Iowa, 482; *Borland v. Thornton*, 12 Cal., 440; *Riddle v. Baker*, 13 Cal., 295; *Railroad Co. v. Neal*, 1 Wood, 353; *Greene v. Greene*, 2 Gray, 361; *LeGuen v. Gouverneur*, 1 Johns. Cas., 436; *Fischli v. Fischli*, 1 Blackf., 360.

In the case of *LeGuen v. Gouverneur*, 1 Johns. Cas., 436, the appellant had recovered judgment in the Supreme Court against the respondent. Afterwards the respondent filed a bill in chancery, alleging fraud in the contract for the sale of a portion of the goods, for the value of which the judgment was obtained. The court say: "The general principle, that the judgment or decree of a court possessing competent jurisdiction shall be final as to the subject-matter thereby determined, is conceded on both sides, and can admit of no doubt. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in said cause, and which they might have decided." Judge KENT, in an opinion in the case, says: "The only cases which I can recollect as forming exceptions to this general rule, are: 1. The case of mutual dealings between the parties when the defendant omits to set-off his counter demand, and may still recover in a cross action, and 2. The case of an ejectment, in which the defendant neglecting to bring forward his title, is not precluded by the recovery against him from availing himself of it in a new suit." *Cooper v. Martin*, 1 Dana, 23; *Grant v. Button*, 14 Johns., 377; *Loomis v. Pulver*, 9 Johns., 244; *White v. Ward*, 9 Johns., 232; *Batley v. Button*, 13 Johns., 187; *Cansfield v. Mungor*, 12 Johns., 347; *Holden v. Curtis*, 2 N. H., 61; *Tilton v. Gordon*, 1 N. H., 33; *Thatcher v. Gammon*, 12 Mass., 268; *Homer v. Fish*, 1 Pick., 435; *Holmes v. Avery*, 12 Mass., 136; *Shriver v. Commonwealth*, 2 Rawle, 206.

The exception referred to by Judge KENT, and the independent character of the defense has been in some instances carried to a length beyond the more recent decisions—as in the case

of *Bentley v. Morse*, 14 Johns., 468, when the defendant had paid the debt, but allowed judgment to go against him by default, it was held that he might recover the money back in a subsequent suit: *Whitcomb v. Williams*, 4 Pick., 228; *Cobb v. Curtis*, 8 Johns., 470; *Lazell v. Miller*, 15 Mass., 207; *Miner v. Walter*, 18 Mass., 238; *Fowler v. Shearer*, 7 Mass., 14; *Rowe v. Smith*, 16 Mass., 306.

In the case of *Hendrickson v. Hinkley*, 19 How., 243, a bill of equity was filed to enjoin a judgment at law for reasons following, to wit: 1. That the consideration of the notes upon which the judgment was founded, was obtained through fraud. 2. On account of surprise in the production of certain evidence on trial; and 3. That the complainant held counter-claims against the plaintiff in the judgment, who resided out of the jurisdiction of the court, and asked that they might be set-off against the judgment. As to the fraud set up, the court held the verdict and judgment to be conclusive. As to the matter of surprise, the court held that a motion for delay, or for a new trial in the court in which the trial was had, if made, afforded a complete remedy. And as to the claim of set-off, the court held that as the complainant had purposely omitted to set-off those claims in the action at law, and having made his election to retain them for a separate action, he must abide by the election so made, and used this language: "Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it: *Barker v. Elkins*, 1 Johns. Chy., 465; *Green v. Darling*, 5 Mason, 201. It is laid down in some of the text-books, that the court of equity obtains its jurisdiction over the subject matter of judgments fraudulently or unconscientiously obtained solely by its power over the parties to the judgment, and not over the judgment itself: 2 Story Eq. Jur., sec. 895; *Pearce v. Olney*, 20 Conn., 544; *Hilliard on New Trials*, 454. This doctrine without qualification might be construed so as to give a court of equity jurisdiction whenever it might have the parties within its jurisdiction, regardless of the locality of the court having exclusive jurisdiction of the judgment, which is, I think, contrary to the spirit of the law. In the early days it was declared that "fraud upon a court, in obtaining a judgment or sentence, can only be examined by the court where the fraud was committed, or another having concurrent jurisdiction." *Meadows v. The Duchess of Kingston*, Ambler's Rep., 766.

In the case of *Brown v. The County of Buena Vista*, 95 U. S., 157, the court says: "The power of a court of equity to relieve against a judgment upon the ground of fraud, in a proceeding had directly for that purpose, is well settled. The power extends also to accident and mistake."

One of the reasons urged against the exercise of the power of a court of equity in one State to enjoin the execution of judgments in another State, is the principle just laid down, and which is clearly within the general doctrine of comity observed in courts: *Bicknell v. Fields*, 8 Paige, 440; *McRae v. Mattoon*, 13 Pick., 53; *Field v. Gibbs*, 1 Pet. C. C., 155.

Wherefore the rule doubtless is that, where possible, the application shall be made to the court having control of the case for relief from the result of fraud, accident, mistake or surprise in the conduct of the cause, if knowledge of such fraud, accident and mistake is obtained in time for such application; otherwise the application to a court of equity will be unavailing; for it is one of the most essential prerequisites of equity jurisdiction, especially in the matter of interference in proceedings at law, that there is not and has not been any mode of relief in the law courts. Any failure to avail himself of the remedies afforded by the law courts would, unless he was prevented by an excusable ignorance of the facts, or because he was prevented from making use of such facts, amount to such a want of diligence as would prevent such interposition of the equity court: *Creath's Adm'r v. Simms*, 5 How., 191; *Sample v. Barnes*, 14 How., 70; *Walter v. Robinson*, 14 How., 584; *Brown v. County of Buena Vista*, 95 U. S., 157; *Bateman v. Willoe*, 7 Sch. & Lef., 201; *Massy v. Graham*, 6 Paige, 622; *Callaway v. Alexander*, 8 Leigh, 114; *Powell v. Stuart*, 17 Ala., 719; *Biddle v. Barker*, 13 Cal., 295; *Story Eq. Jur.* 105, 146, 895, 896, 1025a; *High on Inj.*, 97, 85, 114; *Marriott v. Hampton*, 7 Term, 269; *Small v. Preston*, Chy. Ca., 65; *Eden on Inj.*, sec. 64, note 2; *Duncan v. Lyon*, 3 Johns. Chy., 351; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332.

In other words, he must show that he was ignorant of the defense at the trial, or that his defense could not have been received: *Lansing v. Eddy*, 1 Johns. Chy., 50; *Dunham v. Downer*, 31 Vt., 249; *Gott v. Carr*, 6 G. & J. (Md.), 306; *Delly v. Barnard*, 8 G. & J. (Md.), 170; *Brewster v. McCawley*, 7 Gill, 147; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336; *Baker v. Elkins*, 1 Johns. Ch., 466, and that he has used due diligence in making use of the same both before and after trial, both of which are essential to a standing in a court of equity.

Supreme Court, Penn'a.

COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY, Defendant Below, v. FRANK HUNTZINGER, for use.

The distinction between a representation and a warranty is well defined. For an injury resulting from the former the remedy is an action on the case for the deceit; for an injury by a breach of warranty the action is on the contract.

Mere mutual knowledge by the assured and the agent of the insurer of the falsity of a fact warranted is inadequate to induce a reformation of the policy so as to make it conform to the truth.

Knowledge by the underwriter, or by him and the assured, of the breach of a warranty, at the time it is made, does not relieve the assured from the consequences of the breach, and is no basis for reforming the policy, though equity will reform it in case of a mutual mistake of facts.

Warranties in insurance policies differ from those in relation to the sale of personal chattels.

Knowledge that the answer was untrue might relieve against a false or imperfect representation, but not against a warranty. That which is a warranty in a policy of insurance by its terms cannot be shown by parol evidence to have been inserted by mistake.

A contract based upon guaranties of facts which do not exist cannot be enforced by the party making the guarantee.

If an agent of an insurance company, intending to write an answer to his question as made by the applicant, write something else, and the paper is signed, both believing the answer correctly written, there is a mutual mistake and the policy may be reformed. Where the answer is written as made, there is no mutual mistake, and no relief for him who warranted it, unless the agent deceived him into the making.

Error to the Court of Common Pleas of Lancaster county.

Opinion by TRUNKEY, J. Filed June 20, 1881.

The application and policy evidence the contract between the parties, and it is stipulated that "this application shall form a part of this policy of insurance, and all the statements herein shall constitute warranties on the part of the insured." One of the statements is, that the amount insured on the property is \$1,500 in Pennsylvania Mutual of Columbia. In fact the amount of insurance was \$2,000. To avoid the consequences of a breach of his warranty, Huntzinger called James W. Ziebach, who testified that he was agent for the company, defendant, and also for the Pennsylvania Mutual of Columbia; that the defendant did not furnish him blank policies to write and issue; that he received the application, sent it to the company, and if it accepted the risk, the policy was forwarded to him and he delivered it to the insured. When he took this application he read the question: "What amount is there insured on the property, in what company and in whose

name?" Huntzinger said "he had \$1,500 or \$2,000 insurance in the Pennsylvania Mutual, he didn't know which. He thought it was \$1,500; I said, we ought to know for sure. He said, my policy is at the house. He didn't have it in the store and he was not sure about it. He was under the impression it was \$1,500 and put it down \$1,500. I said, we would put it down \$1,500 because I thought it was that. And he signed the application."

It is clear beyond question that the plaintiff intended to make the statement as written when he signed the paper and knew just what he was doing. There was no mistake or fraud by the agent in writing one thing when the answer was another. The oral and written testimony entirely accord. Each kind shows that Huntzinger stated the amount of insurance was \$1,500, and that the true amount was \$2,000. The plaintiff must have known that the policy was not issued by the agent, but by the company, after its acceptance of the risk. There is not the slightest evidence that he was induced to sign the application by the agent's deceit. If honest, neither remembered the amount of insurance, but the policy was in the applicant's house. If a fraud was perpetrated, it was participated in by both agent and insured, for they agreed upon the same thing. However, under the charge of the court, it may be taken as settled by the verdict that the plaintiff committed no fraud, but on the contrary acted in good faith when he warranted a statement which he did not know to be true and could have ascertained it was false by looking at his policy. The court charged that if Huntzinger and Ziebach had forgotten "the exact amount insured prior in the Pennsylvania Mutual Company, then the mistake was mutual—both dealt under a mutual mistake in respect to that matter of fact—it will not vitiate in itself this policy in the absence of fraud; and the defendant has no defense in this suit, but the proof of fraud." If this ruling be correct, nothing can be of less value than the warranty of a representation; the representation would be just as good without its warranty.

The distinction between a representation and a warranty is too broad and well defined to require remark. For an injury arising from a false representation, the remedy is in case for the deceit, bad faith lying at its foundation; for an injury by a breach of warranty, the action is upon the contract, and it is immaterial whether the defendant did or did not believe the fact he warranted. Precisely the same principles apply in making a defense on the ground of the plaintiff's false representation, or breach of warranty, as would in sustaining an action on such

grounds. Here no question was raised as to false representation by Huntzinger which involved fraud or bad faith on his part. The testimony adduced by himself plainly revealed his broken warranty, and the chief question was as to the effect of that upon his claim under the policy. It is not material whether the agent knew of the breach. "Mere mutual knowledge by the assured and the agents of the insured of the falsity of a fact warranted, is entirely inadequate to induce a reformation of the policy so as to make it conform with the truth. It is rather evidence of guilt collusion between the agents and the assured, from which the latter can derive no advantage." Knowledge by the underwriter, or by him and the assured, of the breach of a warranty, at the time it is made, does not relieve the assured from the consequences of the breach, and is no basis for reforming the policy, though equity will reform it, in the case of mutual mistake of facts. It is not true that the rule which prevails in sales of personal property namely, that a warranty does not embrace defects known to the purchaser, is also extended to warranties contained in policies of insurance. The purpose in requiring a warranty is to dispense with inquiry and cast upon the assured the obligation that the facts shall be as represented. A representation and a warranty are essentially different things and call for the application of different rules of law. Knowledge that the answer was untrue might relieve against a false or imperfect representation: *State Mutual Fire Insurance Co. v. Arthur*, 6 Casey, 315. This doctrine, enunciated in that case, has not since been doubted in Pennsylvania.

In *Cooper v. Farmers' Mutual Insurance Co.*, 14 Wright, 299, it was held that that which is a warranty in a policy of insurance by its terms, cannot be shown by parol evidence to have been inserted by mistake. This certainly is sound, if understood with reference to such mistakes of the assured as where he makes a false statement believing it to be true, without having been deceived and misled by the other party. No principle of law will enable a party, who guarantees a fact upon which a contract for insurance is based, which fact is afterwards found not to exist, to enforce the contract. He agrees to answer for the truth of the fact, and cannot escape on the ground of his mistake as to its existence. But if by a fraud or mistake of the other party, or of the agent of the other party while acting within his authority, he be induced to sign a statement which he did not make and did not intend to make, such statement is not only void as to himself, but he shall not lose the benefit of a contract for which he paid the stip-

ulated consideration, and held without knowledge of the mistake or fraud. If an agent for an insurance company, intending to write an answer to his question as made by the applicant, write something else, and the paper is signed, both believing the answer correctly written, there is a mutual mistake and the policy may be reformed. Where the answer is written as made, there is no mutual mistake, and no relief for him who warranted it, unless the agent deceived him into the making of it.

The case of *Smith v. Farmers and Mechanics' Mutual Fire Insurance Co.*, 8 Nor., 287, and *Eilenberger v. Protective Mutual Fire Insurance Co.*, *Id.*, 464, are not at all in conflict with prior decisions as to the effect of a warranty actually made; they relate to the admissibility of evidence to show fraud or mistake by an agent of the company of which the assured had no knowledge till after his loss, and his right to recover upon his policy, notwithstanding such fraud or mistake. Of like purport is the decision in *Insurance Co. v. Wilkinson*, 11 *Amer. L. Register*, 485, where it is said in the opinion, that the insured did not intend to make the representation when he signed the paper, did not know he was doing so, and had refused to make any representation on the subject; it was held that the answer written by the agent was his, not the applicant's and his principal, the company, was bound by it.

We are of opinion that the plaintiff's fifth point should have been refused, and the defendant's point affirmed. If the jury believed the evidence of Ziebach, the plaintiff was not entitled to recover. The facts assumed in the defendant's point were shown by written evidence, and were not disputed.

The conditions of insurance provided that notice of additional insurance, or of any change in existing insurance shall be given to the company by the insured in writing, and shall be acknowledged in writing by the secretary; and no other notice shall be binding or any force against the company. In absence of evidence of waiver of the notice required in this stipulation, we do not think "the jury would be justified in inferring that knowledge of the agent will bind the principal of notice of subsequent insurance or surrender of previous insurance." The parties agreed that written notice should be given, and in like manner acknowledged by the secretary; mere knowledge of an agent is not equivalent of that. *Judgment reversed.*

For plaintiff in error, *Messrs. H. M. North and J. D. Coitrell.*

Contra, Messrs. J. P. S. Gobin, A. J. Kauffman and A. J. Eberly.

Circuit Court, United States.

Western District of Pennsylvania.

DUNCAN McBANE v. GEO. W. WILSON et al.

Under the Pennsylvania Recording Acts a deed of conveyance which is not recorded within six months after its execution, is null and void as against a subsequent *bona fide* purchaser for a valuable consideration, if the deed to the latter is first recorded.

The possession which affects a purchaser with notice must be clear, open, notorious and unequivocal.

H conveyed lands to M, 1867, and the deed by agreement was withheld from record and not recorded until 1876, and then without the knowledge or consent of either parties to it, but at the instance of some unknown person. In 1873 H conveyed the same lands to S for a valuable consideration, without notice of M's title, which deed was recorded in 1874, and S, during negotiation with H for the purchase, was informed by M that he had no interest in the land, and B, the plaintiff in the judgment under which M's title was afterwards sold to W, requested and incited S to purchase from H, and stated that the title was clear.

Held, that beyond controversy both M and B were estopped from disputing S's title or asserting any claim or lien in hostility thereto, and W, the sheriff's vendee under B's judgment, took no title as against S.

ACHESON, D. J. In pursuance of written stipulation this case was tried by the court, without the intervention of a jury.

The following facts are, therefore, found by the court.

1. The plaintiff and the defendants in this case respectively claim title to the land in controversy through and under Jake Hill, who became seized thereof in fee-simple prior to October 31, 1867.

2. By deed dated and acknowledged October 31, 1867, Jake Hill sold and conveyed the land in controversy to Henry Metzger. On or about its date this deed was delivered by Hill to Metzger, but by agreement between them it was withheld from record. Said deed was not recorded until June 8, 1876, and then, without the consent or knowledge of either of the parties to it. It was recorded at the instance of some unknown person who had obtained possession of it.

3. The land in controversy is the undivided one-eighth part of certain tracts of timber land (described in the record in this case) situate in Jefferson county, Pennsylvania. The other owners of said lands were E. G. Carrier and S. S. Jackson. From the date of his deed from Hill down until the summer of 1872, he (Metzger) and his said co-tenants, E. G. Carrier and S. S. Jackson, were engaged in the business of "lumbering"—running lumber *via* the Allegheny river to the Pittsburgh market—and in the prosecution of this business Carrier and Jackson cut and removed timber from said tracts of land. At the time of the sale and con-

veyance to Alexander Smith hereinafter mentioned, Carrier and Jackson were cutting timber from said lands and accounting to Metzger for his share. Henry Metzger lived in the City of Pittsburgh and never was on said land except on three or four occasions in the course of said lumbering business, when he visited the lands and was there during a few days. He never took or held visible or actual possession of said land otherwise than as stated in this finding. —

4. On the 17th of May, 1873, Andrew F. Baum obtained a judgment in the Court of Common Pleas of Allegheny county, Pennsylvania, against the said Henry Metzger, for the sum of \$4,454.02, which judgment was duly transferred to the Court of Common Pleas of Jefferson county Pennsylvania, by filing therein on May 21, 1873, a certified copy of the record; and on the 15th day of December, 1875, by virtue of an execution issued from the Court of Common Pleas of Jefferson county on said judgment, the sheriff of Jefferson county sold all the right, title and interest of the said Henry Metzger in and to the land in controversy to George W. Wilson, one of the defendants, and subsequently executed to him a deed therefor, which was duly acknowledged September 21, 1876. The defendants are in possession and hold under this deed.

5. By a deed bearing date June 12, 1873, and duly executed, acknowledged and delivered on the 16th day of June, 1873, the said Jake Hill sold and conveyed the land in controversy to Alexander Smith for the consideration of \$15,000, which said Smith then paid to said Hill in cash. This deed was recorded in Jefferson county, Pennsylvania, on the 8th day of September, 1874, in Deed Book, vol. 29, page 260.

6. At the time the said Alexander Smith bought and paid for said land and received his deed therefor, he did not know of the prior deed from Jake Hill to Henry Metzger, nor had he any knowledge that said Metzger had any title to said land.

7. Said Smith had knowledge that Metzger was operating said land, but not how; and before he closed his bargain with Hill for said purchase, he (Smith) inquired of said Henry Metzger and was told by him that he had no interest in said land, nor any objection to his (Smith's) buying the same.

8. Andrew F. Baum, the plaintiff in the above mentioned judgment, asked said Alexander Smith to buy said land from Hill and encouraged him to do so,—stating to Smith that the title was clear,—and he (Baum) was present when Smith paid his purchase money.

9. The said Alexander Smith was a *bona fide*

purchaser for a valuable consideration of the land in controversy, without notice that the said Henry Metzger had, or claimed to have, any title, interest, estate or claim in or to the same, and without notice that said Andrew F. Baum had, or claimed to have, any lien against the same.

10. Immediately after his said purchase said Alexander Smith entered into an arrangement with his co-tenant, S. S. Jackson, to cut timber upon said tracts of land and account to him (Smith) for his share, and this arrangement was carried out. After Smith's purchase Henry Metzger had no connection whatever with said land.

11. By deed dated and acknowledged February 20, 1875, the said Alexander Smith sold and conveyed the land in controversy to the plaintiff, Duncan McBane. The consideration for this conveyance is stated in the deed to be \$15,000, and the same is receipted for in the body of the deed and also at the foot thereof. This last mentioned deed was recorded in Jefferson county, Pennsylvania, on the 26th day of February, 1875, in Deed Book, vol. 30, page 14.

Opinion by ACHESON, D. J. Filed July 31, 1881.

Under the Pennsylvania Recording Acts a deed of conveyance which is not recorded within six months after its execution, is null and void as against a subsequent *bona fide* purchaser for a valuable consideration without notice, if the deed to the latter is first recorded: Pur., vol. 1, pp. 472-3, pl. 76; *Lightner v. Mooney* 10 Watts, 407; *Poth v. Anstatt*, 4 W. & S., 307; *Hetherington v. Clark*, 30 Pa. St., 393; *Shaw v. Read*, 47 Id., 102. Here, the deed to Alexander Smith was recorded September 8, 1874, while that to Henry Metzger was not recorded until June 8, 1876. Undoubtedly Smith was a *bona fide* purchaser for a valuable consideration, and he had neither actual nor constructive notice of Metzger's title. The possession which affects a purchaser with notice, must be clear, open, notorious and unequivocal: *Meehan v. Williams*, 48 Pa. St., 238, 241. In my judgment Metzger never had such possession as would visit a purchaser with constructive notice of his title. The occupancy and acts of Carrier and Jackson were fairly referable to their own, and not Metzger's title. But further discussion of this point is needless, for, in fact, before he concluded his purchase, Smith inquired of Metzger, and he, knowing that Smith was bargaining with Hill, informed Smith that he had no interest in the land. Furthermore, Andrew F. Baum, the plaintiff in the judgment under

which Metzger's supposed title was afterwards sold, requested and incited Smith to purchase from Hill, and stated that the title was clear. Beyond all controversy both Metzger and Baum were forever estopped from disputing Smith's title or asserting any claim or lien in hostility thereto.

Is George W. Wilson, the sheriff's vendee, in any better position? What rights has he superior to those of the judgment creditor upon whose execution he bought and the defendant in the writ whose title he acquired? The title which Metzger had when the lien of Baum's judgment attached was at the best a conditional one, liable to be swept away unless the recording acts were complied with: *Souder v. Morrow*, 33 Pa. St., 85. As a penalty for his neglect, the law extinguished Metzger's title; and as a necessary consequence the lien of Baum's judgment ceased. If this were not so the recording acts would afford little protection to a *bona fide* purchaser, for by no vigilance could he guard against such secret liens. That a judgment creditor is not a purchaser of an interest in his debtor's land is declared in *Cover v. Black*, 1 Pa. St., 493. "He stands on the foot of his debtor," it is there said (*ibid.*, 495). Lien is an incident but not the object of a judgment, and the judgment creditor is not entitled to any advantage which his debtor had not: *Reed's Appeal*, 13 Pa. St., 475, 478.

A purchaser at a sheriff's sale is affected by the records and state of possession at the time when the sale takes place: *Ginrich v. Foltz*, 19 Pa. St., 38; *Stewart v. Freeman*, 22 Id., 120. Now at the date of the sheriff's sale on December 15, 1875, Metzger was not in possession and his deed was not yet recorded. But Smith's deed was then on record and had been for fifteen months. The records, therefore, gave unequivocal notice to Wilson that under the recording acts Metzger's title was extinct.

It thus appearing that the title of Alexander Smith was good and valid it is not necessary to consider whether the title of his vendee, Duncan McBane, the plaintiff, would not be good even if that of Smith were impeachable.

Upon the facts found, I am of opinion that the plaintiff is entitled to recover; and, accordingly, the court do find in favor of the plaintiff, and that he recover the land claimed by him and described in his *precipe*.

Let judgment be entered upon the finding of the court, for the plaintiff for the land claimed by him and described in his *precipe*, with costs.

By the Court.

For plaintiff, Messrs. Brown & Lambie.

Contra, Thomas M. Marshall, Esq.

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LAWYER AND CLIENT—RIGHT OF ACTION FOR FEES.

[FROM THE CENTRAL LAW JOURNAL.]

As early as 1793, it was held in Pennsylvania, in the case of *Brackenbridge v. McFurlane*, Addis., 49, that an action could be maintained for counsel fees. The action was for 10£ for services in the conduct of certain litigation. It was urged on the part of the defendant, that the attorney's fee was fixed by law at the sum of four dollars in any case, and that no action could be supported for any greater sum; and further, that no action would lie for counsel fees. But the court said: "Attorneys, in this State, act in two capacities, as attorneys and as counsel. The plaintiffs, in any suit, can recover from the defendant no more than four dollars as his attorney's fee. But this does not limit the attorneys or counsel here in their demands against their clients, for their services and management, as agents or counsel; and a jury may give, over this sum, a just compensation for such services and management." Although this case was decided at *nisi prius*, it is of value as being the oldest American case upon the subject, and showing at what an early date the two branches of the profession became fused and practically inseparable. See, also, *Lynch v. Commonwealth*, 16 S. & R., 368. Later, however, the Supreme Court of that State took a different view of the question, and in *Mooney v. Lloyd*, 5 S. & R., 412, (1819) returned to the English doctrine. In 1830, however, the soundness of this decision was questioned in *Gray v. Brackenridge*, 2 Pa. St., 75, and in effect overruled. Later still, in *Foster v. Jack*, 4 Watts, 337, the same court, GIBSON, C. J., pronounce the rule of *Mooney v. Lloyd*, "incompatible with the business and necessities of both counsel and client here." And this seems to be the result of the American cases generally: *Bruyn v. Richardson*, 56 Barb., 9; *Blanke v. Bryant*, 55 N. Y., 649; *McMahon v. Smith*, 6 Helsk., 167; *Stevens v. Adams*, 23 Wend., 63. See, however, the contrary ruling of the United States Circuit Court for the District of Columbia (1817), in the case of *Law v. Ewell*, 2 Cranch, 144. The only State which presents an exception to this rule is, we believe, New Jersey, where the

old doctrine has been maintained unimpaired: *Seeley v. Brown*, 15 N. J. L., 35, (1835); *Van Atta v. McKinney*, 16 Id., 235, (1837). See, also, the late decision of *Schoup v. Schenck*, 40 Id., 195, where the court uses this language: "Before closing my remarks on this head, I will add the observation that the American decisions on the subject have not been overlooked, and that it is quite understood that the weight of such decisions is in favor of considering the English doctrine relating to this topic, even as it relates to advocates, as obsolete and inapplicable to the times. All I wish to say is, that I cannot concur in this view; for the rule in question has flourished in full vigor as a part of the common law, and has never, during any interval of time, fallen into disuse; and that as its only foundation was its supposed efficacy in sustaining the honorable standing of the advocate, I can by no means admit that such a rule is alien to the professional ethics of this country. The principle that the advocate cannot stipulate with his client for his perquisites, is one of the established customs of our inherited jurisprudence, and is entirely consistent with our social conditions, and, therefore, in my opinion, is not to be eliminated except by legislation." Just when and how the old rule was abrogated in this country, it is difficult to say. Although it was indubitable a part of the common law, and could only be legally abrogated by statute, the courts have, with singular unanimity, taken upon themselves the responsibility of saying that it is so inapplicable to our circumstances, and inappropriate to our methods of doing business, as to be no longer in force: *Stevens v. Adams*, 23 Wend., 57; *Stevens v. Monges*, 1 Harringt., 127; *Newman v. Washington*, Mart. & Yerg., 79; *Wilson v. Burr*, 25 Wend., 386; *Adam v. Stevens*, 26 Id., 451; *Lorillard v. Robinson*, 2 Palge, 476.

In some of the cases it has been urged that the tax fee, which is sometimes directed by statute to be included in the bill of costs, as the attorney fee, and to be paid to the successful party, and which is usually an insignificant sum, is to be considered as the whole legal compensation of the counsel; but this has universally been repudiated as an absurd doctrine by the courts: *Stevens v. Adams*, 23 Wend., 57; *Newman v. Washington*, Mart. & Yerg., 79; *Stevens v. Adams*, 26 Wend., 451. "It cannot be seriously thought," say the court in Tennessee, "that the General Assembly intended the tax fee, which is directed to be included in the bill of costs in each suit, as the sole reward of professional exertion. According to this doctrine, the advocate who has, perhaps, spent as

much money as would afford him the means of sustenance during life, for the purpose of qualifying himself successfully to plead the cause of the injured, must labor for the litigant by day and by night, throughout a protracted controversy; and, if in the end he should be victorious, and secure to his client an estate, he will receive the liberal compensation of two dollars and fifty cents—and if he should happen to be conquered, he must content himself with nothing." *Newman v. Washington*, Mart. & Yerg., 82.

The right of action, which, as seen above, exists for the recovery of counsel fees, although contractual in its nature, differs in many essential particulars from the right of action arising out of the ordinary contract for personal services. The relation can only exist, and consequently the right of action arise, in those cases where the party claiming compensation as such, is a duly licensed attorney, entitled to practice: *Ames v. Gilman*, 10 Met., 239; *Tendrick v. Hiner*, 61 Ill., 189. This rule, however, seems to be directed against interlopers and pretenders rather than regular members of the profession, who happen not to have been formally enrolled in the court in which the services were rendered: *Harland v. Lienthal*, 53 N. Y., 438.

Though the relation is contractual in its nature, the lawyer is not a mere agent, holding only such authority to act as grows out of his contract with, or instructions from, his client; but he is invested on the one hand with a wide discretion, and confined on the other by restraints, which the policy of the law has made incidental to his character. His right to recover compensation for his services is dependent upon his having done his duty as a lawyer, and not upon his literal obedience to his client's instructions. Thus in an action growing out of the consent to the discharge of a prisoner, on preliminary examination, by counsel who had been retained to prosecute him on a charge of forgery, but who became convinced of his innocence by the testimony of an unbiased witness, who contradicted his client, the prosecutor, it was held that he was entitled to compensation for his services, notwithstanding such consent to the discharge was contrary to the instructions of his client: *Rush v. Cavanaugh*, 2 Pa. St., 187. Here the counsel, although retained by a private prosecutor, was, by virtue of the exercise of the duties of prosecuting counsel, placed in the position of the attorney-general, and was bound to exercise the delicate discretion which the law has intrusted to the occupant of that office, and the proper exercise of this discretion cannot be controlled or limited by the

instructions of his client. Nor would a failure to permit it to be so controlled, deprive him of his right to compensation for the services rendered.

On the other hand, in view of the great power reposed in the hands of the counsel, and of the peculiarly confidential relations which subsist between him and his client, and of the disadvantages of the position in which the latter is placed in any negotiation between them involving adverse interests, the courts have been very strict in requiring the utmost good faith on the part of counsel in all dealings with his client, and if his conduct or contracts savor but ever so little of fraud or oppression, relief will be granted. Not only does he become liable for loss occasioned in consequence of his negligence or fraud (*Dearborn v. Dearborn*, 15 Mass., 316), but he forfeits all claim to compensation for the services actually rendered in the premises: *Wills v. Kane*, 2 Grant, 60; *Brackett v. Norton*, 4 Conn., 517; *Balbaugh v. Frazer*, 19 Pa. St., 99; *Runyon v. Nichols*, 11 Johns., 547; *Gleason v. Clark*, 9 Cow., 57. It has, however, been held that professional infidelity in one proceeding will not work a forfeiture of the right to compensation for meritorious services honorably performed in another: *Currie v. Cowles*, 6 Bosw., 460. Where an agreement was made by the client with his counsel, after the latter had been employed in a particular business, by which the original contract for compensation was varied, and a greater compensation was secured to the counsel than had been agreed upon when he was first retained, the court held that such a contract was invalid and could not be enforced, because of the confidence which is necessarily reposed in the counsel by his client, and the necessity of preserving the profession free from the temptation of making such advantageous bargains: *Lecatt v. Sallee*, 3 Porter (Ala.), 115.

Not only does the lawyer owe a duty to his client but he owes a duty to the public, undefined and general it is true, but nevertheless substantial and real, and he will not be permitted to recover compensation for services rendered in contravention of this principle. Thus where the plaintiff, a lawyer, instigated and encouraged the defendant to engage in a riot, and promised to defend him in case he should be prosecuted, and the defendant was prosecuted, and the plaintiff did so defend him and then brought suit for compensation for such services, it was held that there could be no recovery. The plaintiff's promise could not have been enforced by law because the consideration for it was illegal; but, having been performed,

the law will not allow him to recover compensation. In such a case the law leaves the parties where it finds them: *Treat v. Jones*, 28 Conn., 334.

Supreme Court, Penn'a.

REYNOLDS' APPEAL.

Where lands have been extended by an inquest at an annual rental, a *vend. ex.* cannot be issued for the sale thereof after the lien of the judgment on which it is issued has expired, and there has been no revival.

Under the Act of March 26, 1827, the lien of the judgment must be kept alive, notwithstanding any process of execution upon it. If that is not done, the right to issue execution for the sale of lands upon which it was a lien expires at the end of five years from the date of its entry.

The money arising from the half-yearly installments under an extension is payable, not necessarily to the plaintiff in the writ under which the lands were extended, but to the lien creditors in the order of priority of liens.

Jameson's Appeal, 6 Barr, 283, and *Davis v. Ehrman*, 8 Har., 256, followed.

Appeal from decree of the Court of Common Pleas of Luzerne county.

Opinion by GREEN, J. Filed May 2, 1881.

The appellant's judgment was entered on December 31, 1874, and was never revived, nor was any writ of *scire facias* to revive ever issued upon it. On December 31, 1879, the lien of the judgment expired by force of the Act of March 26, 1827. A writ of *fi. fa.* having been issued against the defendant, his real estate was extended on June 1, 1877, at an annual rental of three hundred dollars, and the defendant elected to remain in possession, as he was authorized to do by the third section of the Act of 13th October, 1840, P. D., 649, pl. 72. The semi-annual installments were regularly paid to the appellant as plaintiff in his judgment, No. 1020, January Term, 1875, until the installment for January, 1880, fell due, which was paid by the defendant to the plaintiff in the judgment next in lien, upon the theory that the lien of the appellant's judgment having expired the judgment creditor having the next lien was entitled to the money. Thereupon the appellant issued a *vend. ex. de terris* for the sale of the defendant's land, which was set aside by the court on the ground that the lien of the judgment having expired, the writ was unauthorized.

Of this action of the court below the appellant complains. He argues, as he must, that the right to issue a *vend. ex.* in such circumstances arises upon the construction of the Act

of 1840. Independently of that act, it is very clear that the writ could not issue after the lien of the judgment had expired. The Act of March 26, 1827, section 1, P. L., 129, P. D., 820, pl. 5, contains a positive prohibition against the continuance of the lien of a judgment for a longer period than five years from the date of entry, unless revived by the written agreement of the parties, or unless a writ of *scire facias* to revive is sued out, within that period. It is equally imperative in directing that the issuing of an execution during the pendency of the lien shall not have the effect of prolonging the lien beyond the time fixed by the statute.

In *Jameson's Appeal*, 6 Barr, 183, we held, speaking of the Act of 1827, that "that act changed the whole face of the law on that subject by cutting off every pretense of lien, except that of the judgment, revived at proper intervals by *scire facias* or agreement, in consequence of which it became necessary to revive from time to time, though execution were levied, till the land was actually turned into money by a sale."

In *Davis v. Ehrman*, 8 Har., 256, the same ruling was repeated, and it was also held that a *fi. fa.* issued to enforce the lien of a judgment, and the seizure of the land, does not create a lien on the land distinct from and independent of the lien of the judgment. WOODWARD, J., on page 259, said: "A lien is, indeed, a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment. In such case it never was supposed by the Legislature or the profession that a judgment, and an execution on it, had each a distinct and independent lien. To limit the lien of judgments so explicitly as is done by the Act of 1827, and to leave the lien of executions unlimited, would have been absurd legislation." It was also held in that case, as it has been in others, that a *testatum fi. fa.* is a lien upon lands by virtue of a special Act of Assembly, and that a *fi. fa.* levied upon after acquired lands becomes a lien thereon because the judgment on which it issued was not, and hence there is no analogy to the present case to be derived from those illustrations. As the present is the mere case of the issue of a *vend. ex.* upon a judgment whose lien had expired, it follows that it was an unauthorized writ, unless there is something in the Act of 1840 which gives it a lawful character.

The appellant's contention on this subject is, that by the express terms of the third section of the act, the defendant becomes liable to pay to the plaintiff the half-yearly installments, until

the debt, interest and cost of the *fi. fa.* are fully paid, and that on default for thirty days in the payment of *any* half-yearly installment, "it shall be lawful for the plaintiff, upon making affidavit thereof, and filing the same in the prothonotary's office, to issue a writ of *venditioni exponas* for the sale of said real estate, as fully and with like effect as though a condemnation thereof had taken place."

It is argued that there is no provision requiring the continuing of the lien in the act, and that as the payments are to continue until the whole amount of debt, interest and cost is paid, the right to issue a *vend. ex.* upon default in any of the payments, is absolute, and continues throughout the whole period of the payments. The argument is plausible, but, in our opinion, unsound. The right to issue the *vend. ex.* after default is not an absolute and unqualified right. The very words which confer it restrain its operation, so that it can only be exercised "as fully and with like effect as though a condemnation thereof [of the lands] had taken place."

This phraseology remits us at once to the enquiry, what would have been the plaintiff's right to a *vend. ex.* if the lands had been condemned instead of being extended? The answer to that question is too plain for argument. The writ of *vend. ex.* could only issue while the judgment was a lien. Under the Act of 1827, the lien of the judgment must be kept alive, notwithstanding any process of execution upon it. If that is not done, the right to issue execution for the sale of lands upon which it was a lien expires at the end of five years from the date of its entry. There is nothing in the Act of 1840 repealing the Act of 1827, nor do any of its provisions purport in any manner to give a new or different life to the lien of judgments from that which was given by the Act of 1827. On the contrary, the fourth section of the Act of 1840 expressly provides "that the money arising from the half-yearly installments shall, under the direction of the court, be distributed among the different lien creditors according to the priority of their liens, in the same manner, and with like effect, as in case of distribution of money arising from sheriff's sales." The money is therefore payable, not necessary to the plaintiff in the writ under which the lands were extended, but to the lien creditors in the order of priority of their liens. The act must therefore be read and interpreted with reference to the existing state of the law as to liens and the proceedings under them.

In view of these considerations, we think the action of the learned court below in setting aside

the writ of *vend. ex.* issued in this case was clearly right, and the order must therefore be affirmed.

Order affirmed and appeal dismissed at cost of the appellant.

For appellant, *A. Ricketts, Esq.*

Contra, Jos. D. Coons, Esq.

MACUNGIE SAVINGS BANK, to use, v. BASTIAN.

The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is a trust fund for the benefit of creditors.

The board of directors of an insolvent bank having duly made an assessment on unpaid stock subscriptions for the purpose of meeting the liabilities of the bank, a depositor cannot set-off the amount due him on account of his deposit, against the amount of assessment due by him on account of unpaid stock subscriptions. *Jordan v. Sharlock*, 3 Norris, 366; *Fox's Appeal*, 8 W. N. C., 556, distinguished.

Error to the Court of Common Pleas of Lehigh county.

Assumpsit, by the Macungie Savings Bank to the use of Charles W. Cooper, assignee of said bank, against Reuben Bastian, to recover unpaid assessments upon a stock subscription.

The plaintiff, under a rule of court, filed a statement setting forth that the Macungie Savings Bank was duly incorporated on the 28th day of March, 1867, that at the opening of the subscription book Bastian subscribed for 100 shares of stock of the par value of twenty dollars per share, paying on account therefor five dollars per share, and that he duly received the certificate. That on the 29th of April, 1878, the bank made an assignment to the use plaintiff, and the assets not proving sufficient to pay the debts, the Board of Trustees, by resolution dated September 23, 1879, made an assessment of fifteen dollars per share, to recover which amount upon each of defendant's shares this suit was brought.

The defendant filed an affidavit of defense alleging, *inter alia*, that on the 25th of March, 1877, and the 7th of May, 1877, he became a depositor in the bank in the several sums of forty-two hundred dollars and two hundred and twenty-five dollars for which he received and still held certificates of deposit, that said sums were still due and unpaid, and that he claimed to set-off these sums against the amount due by him for his stock subscription.

The Court (ALBRIGHT, P. J.), discharged a rule for judgment for want of a sufficient affidavit of defense.

The plaintiff took this writ, assigning for error the action of the court in refusing to enter

judgment for want of a sufficient affidavit of defense.

For plaintiff in error, *C. J. Erdman, Esq.*
Contra, Messrs. Henninger and De Wall.

Opinion by STERRETT, J. Filed March 14, 1881.

The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is undoubtedly a trust fund for the benefit of its creditors: *German-town Railway Co. v. Fittler*, 10 P. F. Smith, 131; *Woods v. Dummer*, 3 Mason, 308; *Mann v. Pentz*, 3 Comstock, 422. While such unpaid subscriptions pass, as assets, to the assignee under a voluntary assignment for the benefit of creditors, and the directors of the insolvent corporation may be required to make such calls on subscribers to the stock as may be necessary to enable him to collect the same, they still retain the impress of trust funds and must go into the hands of the assignee intact, for the purpose of distribution among those for whose benefit they were intended. In this respect they differ from ordinary choses in action belonging to the assignor at the date of assignment. Against the latter, legitimate claims of set-off may exist, and what remains, after deducting the same, is all that can properly be considered a part of the trust fund.

The demand against defendant in this case is not grounded on business transactions between him and the bank since its organization. It originated in the very creation of the bank, of which he was one of the corporators. As a condition precedent to the granting of letters of incorporation, they were required by the sixth section of the charter "to raise and form a capital of not less than five nor more than fifty thousand dollars, in shares of twenty dollars each" for the security of depositors. The defendant subscribed for one hundred shares of the capital stock thus required and paid twenty-five per cent. thereof. By resolution of the board, after the assignment, the remaining seventy-five per cent. was "called in for the liquidation of the indebtedness of the corporation." He refused to pay in obedience to the call, and when suit was brought by the assignee in the name of the bank, to recover the balance due and owing by him on his subscription, his defense was that the bank was indebted to him as a depositor in a much larger sum, and therefore he should not be compelled to pay.

If such a defense were entertained, the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the

common benefit of all alike, and apply it to the sole benefit of the defendant, who, at best, has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead. From the fact that the directors called in the whole of the outstanding subscriptions for the purpose of liquidating the indebtedness of the bank, we have a right to assume that it is all required for that purpose. If defendant's indebtedness to the bank at the date of the assignment had been founded on an ordinary business transaction, such as making or indorsing a note, he might with some show of reason insist on setting up by way of defense a counter-claim as depositor. This would bring him within the principle of *Jordan v. Sharlock*, 3 Norris, 368.

In *Sawyer v. Hoag Assignee*, 17 Wal., 610, it is held that a stockholder indebted to an insolvent corporation for unpaid shares, cannot set-off against this trust fund for creditors a debt due him by the corporation; that the fund arising from such unpaid shares must be equally divided among all creditors. That case, it is true, arose under the National Bankrupt Act; but, so far as the principle now under consideration is concerned, the right of set-off and rule of distribution, under that act, do not materially differ from our voluntary assignment law.

The defense set up in this case derives no support from the principle involved in *Fox's Appeal*, 8 W. N. C., 556. The fund for distribution there included proceeds of outstanding subscriptions to capital stock of the Kutztown Savings Bank, which had been collected by the assignee. The whole fund was insufficient to pay depositors who claimed that, as a preferred class, they were entitled to the fund for distribution to the exclusion of other creditors, and, if not entitled to the entire fund, they had at least an exclusive right to that portion of it which represented capital, collected by the assignee; but it was held that the depositors as a class had no exclusive right to the whole or any particular portion of the fund.

As the case was presented to the court below, we are of opinion that the plaintiff was entitled to judgment for want of a sufficient affidavit of defense.

It is ordered that the record be remitted to the court below with instructions to enter judgment against the defendant for fifteen hundred dollars with interest from the time the same was due and payable according to the call, unless

other legal or equitable cause be shown to said court why such judgment should not be so entered.

Court of Common Pleas, No. 1.

THE FOURTH AVENUE REGULAR BAPTIST CHURCH et al. v. GEO. BAILEE et al., Trustees.

A sale of real estate by a master in chancery will be set aside, if, before the confirmation of the same, a higher price is offered, even though no fraud be shown.

The bid at such a sale is merely an offer to purchase, subject to the approval of the court, and therefore the biddings will be opened, if before the confirmation of the sale an advance price is offered.

Petition of Wm. H. Everson, Trustee, to set aside the sale of the Fourth Avenue Baptist Church, Pittsburgh, which had been sold at public sale to the Trustee of the Hebrew congregation for \$16,130, pursuant to a decree in equity.

The petition, which was presented before the confirmation of the sale, averred, *inter alia*, unfairness in the sale and inadequacy of price, and contained a stipulation, with a bond, to bid and pay \$18,130 for the premises.

Testimony was taken in the matter, and thereupon the Court, STOWE, P. J., ordered a resale of the premises and filed the following opinion :

Opinion by STOWE, P. J. Filed May 21, 1881.

Were this a question depending solely upon the rights of the respective bidders at the master's sale, we would have no hesitation in holding that the bid as reported by the auctioneer should be received and the sale confirmed, as there is nothing shown by the evidence which would justify the court in saying that the sale was not conducted properly, or that the parties to whom the property was "knocked down" was not entitled to hold it. The evidence entirely fails to show any fraud, collusion, or even "sharp practice," on the part of either the auctioneer or purchaser. But the right to have the biddings opened does not depend upon these questions.

Where estates are sold by a master, under a decree of a court in equity, the chief aim of the court is to obtain as great a price for the estate as can possibly be got, and it is the habit, after the estate is sold, of "opening the bidding;" that is, of allowing a person to offer a larger sum than the estate sold for, and directing a resale of the property. The mere advance of price, if the report of sale is not absolutely con-

firmed, is sufficient to open the biddings, and they may be opened more than once: See Daniel's Chancery Practice, 1284-5.

In *Hamilton's Estate, Hay's Appeal*, 51 Pa. St., 58, Judge STRONG says, in relation to a bidder at an Orphans' Court sale (which is essentially a court of chancery in its proceedings and decrees within its jurisdiction, 4 Barr, 301): "He stood in the situation of a bidder at a master's sale in chancery." * * * It is the right (of parties in interest) to have as much obtained for the property as can be, and until a sale is made and confirmed they may seek for purchasers who are willing to give more than was offered at public auction.

There is no wrong to the person who bid most at the former sale. His bid, though the highest, was but an offer to purchase, subject to the approval of the court, and in approving sales in partition it is the duty of the court to regard primarily the interest of the heirs. They may ask the court to open the biddings and to order a new exposure of the property at auction. It is enough to say that the bid was but an offer to the court, which it might or might not accept at its discretion. But the biddings will not be opened except upon a reasonable advance and payment of the bidder's expenses: 1 Vesey, Jr., 453, 4 *Id.*, 700, 6 *Id.*, 406-513, 7 *Id.*, 420, 8 *Id.*, 214, 14 *Id.*, 151; 1 Vesey & B., 361, 3 *Id.*, 144; as it would be manifestly unjust to invite purchasers to bid for property, and, when in good faith they sought to secure the property or vindicate themselves from charges of unfair conduct, require them to pay the expenses of such proceeding.

And now, May 21, 1881, it is ordered and adjudged that the sale made by the master on the above matter on the — day of —, A. D. 1881, be set aside, and that the property be again exposed to public sale, upon the terms and conditions heretofore ordered, on ten days' notice by publication, provided the petitioners forthwith pay into court, or to the purchaser's attorneys, on demand, the purchase money paid and the sum of \$150 for the purpose of paying the expenses of counsel in taking testimony and appearing in court and arguing said application. It is further ordered that the commissioner's costs in taking the evidence and other legal costs arising out of this application be paid by petitioners. The foregoing sums to be ultimately paid out of the fund realized by the sale of said property.

By the Court.

For petitioners, *Messrs. J. W. Bailie and Geo. Shiras, Jr.*

Contra, Messrs. Josiah Cohen and W. D. Moore.

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THE FUSION OF LAW AND EQUITY AND TRIAL BY JURY.

[FROM THE SOLICITORS' JOURNAL.]

Notwithstanding all that has been written and said about fusion, for practical purposes the dual system of common law and chancery to a very great extent continues to exist untouched. It is no doubt true that the doctrines of equity are now applicable in the Queen's Bench Division, and so far there is no conflict in the theory of the law as administered by the courts; but to any person who looked at the administration of justice from a materialistic point of view, it would appear as if things were, in most tangible respects, much the same as ever. It is no doubt true that the working of the courts at Westminster has been considerably altered. There is only one chief, and the whole is called the Queen's Bench Division. There is more flexibility of arrangement, and instead of three papers for each class of business, one in each court, there is only one. But notwithstanding all this change (much of which is change of name rather than of substance), the broad features of things remain very largely unaltered. There is still a distinct line of demarcation between chancery and common law judges and chancery and common law barristers; a certain class of cases for the most part go to Lincoln's-inn, and a certain class of cases to Westminster.

We doubt very much whether it is not better that it should always be so to a great extent. With regard to certain kinds of judicial work, particularly those of an administrative nature, it seems to us that the principle of division of labor is applicable, and that loss of time and uncertainty of practice are very poorly compensated for by any theoretical considerations. As far as we can see, there cannot be any objection, even in theory, to appropriating special classes of business, such as winding up of companies, the administration of trusts, matters relating to elections, Crown business, and so forth, to particular divisions of the one court. It may be very well for newspaper articles to imagine a system by which the same judge is

to do everything indiscriminately; but it seems to us as foolish a conception as to suppose that it would really be better if every man was a Jack-of-all-trades. There is no doubt that Jacks-of-all-trades have their merits and advantages under certain circumstances and in certain stages of development, and too great division of labor tends to narrowness; but the facility and accuracy that are derived from special experience are of very great value. The body of English law and practice are really already, and are daily becoming in a greater degree, too large for one and the same judge to have the whole at his fingers' ends. In a court of appeal we believe there is a considerable advantage in dealing with all subjects, as it tends to preserve a certain breadth of view and harmony between the different branches of the law; but in a court of first instance it is otherwise. To our mind the present system of sending Vice-Chancellors (for that is what chancery judges really are) to try murders, and common law judges to do administrative work with the details of which they are entirely unfamiliar, and in respect of which they probably know less than the youngest counsel in court, is deplorably reckless.

When both divisions of the court are housed in one building, the time will come when the question how far, and to what extent, fusion is expedient and possible, will develop itself more rapidly, and will be more easily and naturally solved "*ambulando*." We cannot help thinking that one of the questions which, as this comes about, must come to the front and press for a solution, is how far the system of trial by jury is to be retained for the purpose of civil actions. It certainly appears to us that this is a crucial question in relation to fusion; and when the whole administration of justice takes place in one building, it will be seen to be so. Perhaps the greatest substantial distinction of a tangible kind between the two systems which still so largely continue unfused is, that in one division the vast majority of trials are with juries, and in the other without. There are certain cases for determining the facts of which a jury may be a very proper tribunal. Breaches of promise, malicious prosecution, libels, etc., are cases of this sort. Again, there are certain administrative matters for which juries are entirely unfitted, and in which the same tribunal must necessarily determine the law and the facts. But there are cases of a substantially similar nature which, under the present system, are sometimes tried by a jury and sometimes not, for the most part merely according as the plaintiff may have preferred to issue

his writ in the Chancery of the Common Law Division, as, for instance, cases of obstruction of easements, trespass to land, and other cases in which, in addition to damages, relief by way of injunction is required. If it is right that all the issues of fact in cases such as these should be tried by a judge without a jury, because a claim for an injunction is appended to the rest of the claim, the question must occur to every reasonable mind, why should not many other civil actions be tried before a judge alone?

It is customary among common law judges to lay great stress on the advantages of a special jury in mercantile cases, on the assumption that mercantile men will be found among them. In the present state of the law as to juries it seems doubtful whether this advantage is now to be relied upon, and it is worthy of consideration whether by means of assessors the same advantage could not be secured. The absurdity of acting at the same time on the two incompatible views, one of which lays such stress on the popular nature of the lay tribunal, while the other holds that a trained professional intellect is the better tribunal, will, we feel sure, force itself much more on the public when the two systems are at work in the same building. If the conclusion may be arrived at that the supposed advantages in favor of the jury system are fanciful and unsubstantial, then it is obvious that there are a great many points in favor of the trial by a judge without a jury. Assuming even that, as tribunals for the purpose of arriving at the truth, their substantial advantages are equal, it is at once obvious that, in point of practical convenience, the judge without the jury has many advantages of detail. In the event of any defect or failure of evidence, or temporary accident, which might affect the justice of the case, he can adjourn the case and take it up from where it was left off at any convenient time. He can very much shorten matters by pointing out on what points he wishes to hear counsel, and on what he is satisfied; he can ask questions of the witness which jurymen cannot do to the same extent; in too many ways for enumeration he constitutes a more flexible and convenient tribunal than a jury, and is, on the whole, more likely to be free from prejudice.

With regard to the question of the balance of substantial merit between the two tribunals, considered as engines for ascertaining the truth, we do not, at present, feel disposed to pronounce an opinion. It is, to our mind, a grave question. The old common law system of pleading and trial was based on the idea of the separa-

bility of the questions of law and fact; that certain facts being ascertained as premises by the findings of the jury, the law deduced therefrom a distinct uniform result by way of legal consequence or conclusion. The idea is incapable of being carried out; law and fact cannot be thus separated; and, so, many issues that on the pleadings seemed to be issues of fact really involved issues of law, such as *non assumpsit*, and judges necessarily constituted themselves judges of many facts. Again, it is obvious that a system of law based upon this distinction would probably have the merit of clearness and definiteness, while it necessarily, as a correlative of such clearness and definiteness, would have the demerit of rigidity. Flexibility of legal doctrine, adapting itself to nice gradations of circumstances and of human conduct, it is obvious a system of this sort cannot have. It seems to us one of the most puzzling things to balance these advantages. Certain judges of great power are notorious for their hostility to the equity system. It does, undoubtedly, seem to us that in trial by jury there is involved a very great safeguard for clearness and definiteness of legal doctrines. A good common law judge, both by his training as a pleader and for the purpose of summing up to the jury, was constantly obliged to be throwing the law into definite *formulae* or propositions. This is not so much the case when the law and the facts can be blended together, and reliance is rather placed on precedent than principle. We believe equity practitioners have of late come to a better frame of mind; but we remember some years ago reading disquisitions on the nature of equity in which it was compared to the aroma of choice wines—a thing to be apprehended by a sort of subtle instinct, but not to be confined within the four walls of a proposition. The drawback on the one side is uncertainty and vagueness; on the other, a rigidity which sacrifices everything for clearness and certainty, and will not adapt itself sufficiently to the more subtle exigencies of a complicated and constantly-changing civilization.

We cannot help thinking that trial by jury, and the essential characteristics of the common law way of looking at things, are more essentially connected than perhaps at first sight might appear. The question how far the advantages of either system preponderate, and to what extent they may concurrently exist, or which should chiefly obtain, are questions time must solve; but we cannot help thinking that when the new law courts are open, the solution of these questions will receive a considerable impetus.

Supreme Court, Penn'a.

BAILEY'S APPEAL.

When parties fraudulently represent that the entire stock and assets of a corporation belong to them, whereby they procure the decree of a court dissolving such corporation and acquire possession of its assets, they are liable in equity to be decreed trustees *ex maleficio* as respects a *bona fide* stockholder.

The bill in this case held to be sufficient upon demurrer.

Appeal from the Court of Common Pleas, No. 2, of Allegheny county.

Opinion by STERRETT, J. Filed November 22, 1880.

The single question raised on this record is, whether appellant's bill properly presents such a case as entitles him to relief in either of the forms prayed for. By demurring to the bill, the appellees admit all the facts therein averred, so far as they are well pleaded; and for the purpose of the present inquiry we must assume that they are true.

The first paragraph of the bill distinctly avers that on or about February, 1869, James Bown owned, in his own right, three hundred and fifty shares of the capital stock of the Citizens' Oil Refining Company, for which he held the certificate of the company duly issued to him.

The second, third and fourth paragraphs trace, with sufficient accuracy and precision, the title to the stock from Bown, through the Third National Bank of Pittsburgh and Bown's assignee in bankruptcy into the appellant.

The fifth paragraph charges explicitly that with full notice and knowledge of the said outstanding certificate of stock, and of the fact that the same had been assigned for value by Bown to the Third National Bank, the appellees using the name of the Citizens' Oil Refining Company, without any notice to either Bown, the Third National Bank, or appellant, and without any meeting of the corporators of the said Citizens' Oil Refining Company, caused a petition to be presented to the Court of Common Pleas, No. 2, of Allegheny county, wherein they falsely alleged that the entire stock and assets of the Citizens' Oil Refining Company belonged to them, and procured a decree of said court dissolving the corporation.

The sixth and seventh paragraphs set forth the means whereby the appellees, Lyons and Brush, then obtained possession of all the assets, real and personal, of said defunct corporation; and in the next paragraph it is averred that said assets were of great value, and that the said appellees have continued to use and

enjoy them, and have made and received large gains and profits from the use thereof.

In the ninth paragraph of the bill it is averred that as soon as appellant became aware of the facts thereinbefore stated, he, as owner of said three hundred and fifty shares of capital stock, demanded of appellees an account of the assets wrongfully taken possession of by them, and also of the profits and gains realized by them therefrom, which demand was refused.

The tenth paragraph charges collusion and fraud by and between the appellees, whereby it was made to appear to the Court of Common Pleas that they were the actual owners of all the assets, real and personal, of said Citizens' Oil Refining Company, whereas, in truth and in fact, the owner of the said three hundred and fifty shares of the capital stock of the company was entitled to a fair proportion thereof; and also, that by means of their false and fraudulent allegations as to the ownership of the assets of the company, the appellees induced the court, in January, 1879, to confirm absolutely the account presented by them as trustees of said company; and further, that the proceedings in the Court of Common Pleas were promoted by the appellees as a means and contrivance whereby they sought to defraud the then owner of the said three hundred and fifty shares of stock, and that all of said proceedings were purposely kept secret by the appellees from said Bown, the Third National Bank, the assignee in bankruptcy of said Bown, and from appellant.

In the last paragraph it is claimed in substance that by means of the fraudulent acts charged in the preceding paragraphs of the bill, the appellees became and are trustees of all the assets, real and personal, of the Citizens' Oil Refining Company, and of all gains and profits derived therefrom, to and for the use of those legally owning and holding the capital stock of said company, and that, as such trustees, they are bound to account to appellant for said assets, gains and profits.

The prayers of the bill are: 1st. That the decree of the Court of Common Pleas of January 28, 1879, confirming absolutely the account of appellees, may be declared null and void, in consequence of its fraudulent procurement; 2d. That appellees may be declared trustees of the assets of the Citizens' Oil Refining Company, and, as such, bound to account to the owners and holders of shares of the capital stock of the company, together with all money, profits and income derived therefrom; 3d. That they may be ordered to account to appellant, as owner of three hundred and fifty shares of said stock, for said assets and for the income and profits de-

rived therefrom, and that they may be decreed to pay appellant what rightfully belongs to him on account of his ownership of said shares; 4th. For the appointment of a receiver, and lastly, for further relief.

The allegations of fact contained in the bill, the most material of which we have thus outlined, appear to be pleaded with sufficient clearness and precision; and assuming, as we must in the present attitude of the case, that they are true, we are of opinion that they present a case which the Court of Common Pleas should have entertained. Inasmuch as the case goes back for further proceedings, we refrain from expressing any opinion on any of the questions that are likely to arise. We do not feel called upon at present to say more than that, upon the facts sufficiently averred in the bill and admitted by the demurrer, the appellees are at least trustees *ex maleficio* of the assets of the Citizens' Oil Refining Company, and, as such, liable to account to appellant as owner of the three hundred and fifty shares of the capital stock of said company. How far these allegations of fact may be successfully met by the appellees when their defense is developed, remains to be seen.

Decree reversed at the costs of the appellees, and a procedendo awarded.

For appellants, *Messrs. D. T. Watson and A. M. Brown.*

Contra, Messrs. F. M. Magee and Hampton & Dalzell.

POTTSVILLE MUTUAL FIRE INSURANCE COMPANY v. HORAN.

Where a policy of insurance contained a provision that an increase of the risk, without the written consent of the secretary, would void the policy, it was held that plaintiff could not recover where the risk was afterwards increased, without the consent of the secretary; even though at the time the insurance was effected, the agent was informed of the contemplated change, and actually did charge a higher premium on that account.

Error to the Court of Common Pleas of Schuylkill county.

Opinion by STERRETT, J. Filed May 23, 1881.

The defendant in error warranted the representations contained in his application and covenanted with the company that they were "a just, full and true exposition of all the circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same" were known to him, or material to the risk, and also agreed to accept the policy issued on the application, if in accordance therewith. The policy also declares that it is made and accepted in reference to the application and

the conditions annexed to the policy, which are made part thereof to be used "and resorted to in order to explain the rights and obligation of the parties." The first of these conditions is, that "applications for insurance shall specify the construction and material of the building to be insured, * * * by whom occupied, whether as a private dwelling or how otherwise, its situation with reference to contiguous buildings and their construction or materials."

The second provision: "If, after insurance, the risk shall be increased by any means whatsoever, or if the property be used or occupied so as to render the risk more hazardous than the time of insuring, and the assured shall neglect to notify the company of said increased risk, or fail to pay such additional premium as the company shall determine and obtain the written consent of the secretary to a continuance of the policy, such insurance shall be void and of no effect. A further condition is, that the company shall in no case be deemed to have waived a full, strict and literal compliance with, and performance of each and every of the terms, provisions, conditions and stipulations contained in or annexed to the policy. No agent of this company shall have the right or power to waive any of the foregoing conditions, unless fully authorized thereto by the secretary of the company in writing."

These are some of the many stringent conditions contained in the application, policy and conditions annexed thereto, all of which should be taken together as constituting the written contract between the parties, by which their rights and liabilities must be determined unless it clearly appears that they mutually agreed to alter, waive or dispense with one or more of the provisions therein contained.

The main ground of defense is, that at the time the risk was taken, there was a vacancy of twenty-six feet on the east between the house insured and the Hildebrand house; that shortly afterwards defendant in error erected a new house on the vacant lot, thus filling up the opening and forming practically one continuous row of frame houses, whereby the risk was greatly increased; and that this was done without notifying the company, etc., and obtaining "the written consent of the secretary to a continuance of the policy" as required by the second condition of the contract; and hence the insurance became "void and of no effect." That the erection of the new building upon the vacant lot greatly increased the risk, was clearly established by uncontradicted evidence. Indeed a fact so self-evident required no proof. It was also clearly shown that the fire was communicated to

the insured property from the new building and thus the latter may well be considered the direct cause of the destruction of the former.

A plot of the premises and their surroundings, indorsed on the application, exhibits the vacant space of twenty-six feet as it actually was when the insurance was affected. There is nothing in the testimony to show that the application, including the plot, was not signed and submitted to the company just as the agent and the insured intended it should be. The carpenter shop was purposely omitted from the survey because it was to be removed, but no explanation is given of the omission to note the location of the proposed new building. There was testimony from which the jury might have found that at the time the application was made the insured informed the agent that he intended to build on the vacant lot, and, in view of this, an increased premium was charged; but what evidence is there that the company was informed of these facts or agreed to accept the increased premium as equivalent to the notice and written consent required by the second condition of the policy? There is literally none except the vague impression of Mr. Davidson, the agent. When asked whether he notified the company of Mr. Horan's intention to build on the vacant lot, he said: "I cannot answer it directly. I cannot state positively." And, in answer to the question, "What is your best recollection as to what took place in regard to notice?" his reply was: "My impression is, that I stated the facts to Mr. Haeseler, the general agent." This is not the kind of testimony on which a jury should be permitted to set aside important provisions of a written contract. At best it was only the impression of the witness that he had notified the general agent of Mr. Horan's intention to build, and in view of that he had charged a higher rate of premium. But, let it be conceded that the general agent was so notified, there is not a particle of evidence to prove that he agreed to waive compliance with the requirements of the second condition of the policy. Notwithstanding such notice, he might well suppose that when the new building was erected, the insured would give the required notice, and request the written consent of the company to the continuance of the policy. The insured was a member of the company, had the policy in his possession, and it must be presumed, he knew it was necessary not only to notify the company that he had erected the new building, but also to obtain the written consent to a continuance of the policy. Having failed to do this, the policy by the very terms of condition became void.

Aside from other questions involved in the

assignments of error, we think the defendant's point in which the court was asked to instruct the jury that under all the evidence in the case, their verdict should be for the defendant, should have been affirmed. *Judgment reversed.*

Circuit Court, United States.

Western District of Pennsylvania.

BROCKWAY, Adm'r, to use, v. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

The words "sober and temperate" in a life insurance policy are to be understood in their ordinary sense. They do not imply total abstinence from intoxicating liquors. The moderate and temperate use of intoxicating liquors is consistent with sobriety. If, however, a person should use such liquors to an extent that produces frequent intoxication, he is not sober and temperate within the meaning of the policy.

Although a policy of life insurance is taken out in the name of the assured, yet if that form is adopted as a cover for a wagering policy, and it is actually for the benefit of a party who has no insurable interest and is a merely speculative transaction, the policy is void.

ACHESON, D. J. (charging the jury), May 14, 1881.

This is an action by Charles B. Brockway, administrator of Beckwith S. Brockway, deceased, for the use of D. F. Seybert, against the Mutual Benefit Life Insurance Company of New Jersey. The suit is upon a policy of insurance, dated March 12, 1868, for the sum of \$10,000, issued by the defendant company upon the life of Beckwith S. Brockway, of Salem township, Luzerne county, Pennsylvania. On its face, the policy would seem to have been taken out by Beckwith S. Brockway on his own account. It appears to be an ordinary contract of life insurance between him and the company. By its terms, in consideration of the payment of the cash premium, and the annual premiums therein specified, the company agreed to pay the sum of \$10,000 to the executors, administrators, or assigns of Beckwith S. Brockway, within ninety days after due notice and proof of his death, and proof of interest by the party claiming the insurance money.

The plaintiff gave in evidence:

1. A paper dated March 8, 1868, containing the "declaration" of Beckwith S. Brockway, made upon his application for insurance, and certain printed questions propounded by the company, and the written answers thereto made by Brockway, his friend, and his physician, which answers are expressly made "the basis of the contract" between Brockway and the insurance company.

2. The policy of insurance issued by the Mutual Benefit Life Insurance Company in

pursuance of that application, the policy containing a receipt for \$650, the first premium.

3. A receipt dated March 12, 1869, for \$650, the second year's premium.

4. Proof of the death of Beckwith S. Brockway on December 4, 1869.

5. And it was admitted that due proofs of death and interest were furnished the company on December 27, 1869.

The plaintiff thus made out a *prima facie* case, which would entitle him to your verdict, in the absence of any defense shown by counter evidence. But the insurance company has set up several defenses, and much evidence bearing thereon has been given. These defenses (so far as submitted to you), and the evidence touching the same, both that on the part of the defense, and that in rebuttal, deserve, and should receive, your careful and dispassionate consideration.

The "declaration" made by Beckwith S. Brockway on March 8, 1868, upon the faith of which the policy in suit issued, contains the following stipulation on his part, viz :

"That I do not, nor will I, practice any bad or vicious habit that tends to the shortening of life. And I hereby agree, that the answer made by myself, my physician, and my friend, shall be the basis of the contract between myself and the said company, and if any untrue or fraudulent allegation is contained in said answer, or this declaration, all moneys which shall have been paid to the said company on account of the assurance to be made in consequence thereof, shall be forfeited for the benefit of the company."

The answers, being thus made by the parties the basis of their agreement, became a material part of their contract, and absolutely binding upon the insured; and if any of the answers are shown to be untrue, the policy is void.

The defendant (the insurance company) alleges that several of the answers are untrue. Here it is proper for me to say, that as the defendant makes this allegation, the burden of showing that the answers are untrue is, of course, upon the company. The defendant claims that the untruth of certain of the answers has been shown by the evidence submitted to you. To the answers alleged to be untrue I will now direct your attention.

The tenth and eleventh questions addressed to Beckwith S. Brockway relate to his health; and he was asked whether he had had any of certain specified diseases, or any sickness within the last ten years. To the tenth question he answered: "Nothing but rheumatism, of a sub-acute type, at long intervals, and confined to the hands and finger joints." To the eleventh

question he answered: "Rheumatism, nothing else."

Upon the subject of his health, Brockway's "friend," Silas E. Walton, answered: "I have known him to have slight attacks of rheumatism." And the physician, Dr. R. H. Little, answered: "Has occasionally had attacks of sub-acute rheumatism, seldom requiring medical interference, and not confining him to the house."

These answers are alleged to be untrue. I cannot recall any evidence which shows that Beckwith S. Brockway was ever affected with any of the diseases inquired of other than rheumatism. Whether, as affecting the risk under the policy in suit, there is any essential difference between rheumatism of a sub-acute type, and rheumatism of an inflammatory type, is a question to be settled upon medical testimony, and I am not persuaded that we have sufficient evidence here to solve that question. There is, perhaps, some evidence tending to show that on one occasion this disease affected his knee joints, or one of them. There is also evidence that on several occasions when suffering from rheumatism he was confined to the house; but it is by no means clear that this confinement occurred during the period of time covered by Dr. Little's answer. Upon the whole, I am not satisfied that there is sufficient evidence in the case to justify me in submitting to you the question, whether the answers touching the health of Brockway were untrue; and I therefore instruct you to disregard this particular defense, and to dismiss it altogether from your consideration.

The seventeenth question addressed to Beckwith S. Brockway, and his answer thereto, are as follows:

Q. "Name and residence of the party's usual medical attendant, or of the medical attendant of his family, to be referred to for information as to his health." A. "R. H. Little, Berwick, Pa."

This answer is alleged to be untrue. But I am of the opinion that the evidence upon this subject would not justify a verdict for the defendant, and I therefore instruct you to disregard and dismiss from your consideration this particular defense.

This brings us to a branch of the defense which deserves your most serious consideration.

The thirteenth question propounded to Beckwith S. Brockway, and his answers thereto, are in these words:

Q. "Is the party (Beckwith S. Brockway) sober and temperate?" A. "Yes"

Q. "Has he always been so?" A. "Yes."

The defendant alleges that these answers are untrue, and a very large number of witnesses have been examined in your presence and hearing, and many depositions have been read on the part of the defendant to show the untruthfulness of these answers in respect to Brockway's sobriety and temperance.

On the other hand, the plaintiff has submitted a great deal of testimony, oral and by depositions, to rebut the defendant's evidence on this point, and to sustain the truth of these answers.

The question of fact is for your determination. Was Beckwith S. Brockway on March 8, 1868 (the date of his declaration and answers), a "sober and temperate man?" and had he been always so?" This you should decide according to the weight of the evidence. You will observe that Brockway's answers had respect, not only to the date thereof (March 8, 1868), but to his whole previous life. "Is the party sober and temperate?" "Has he *always* been so?" If either answer was false, there can be no recovery, and there ought not to be. The truth of these answers was relied on by the insurance company. Good faith required truthful answers in respect to so important a matter as the habits of the party applying for insurance touching the use of intoxicating drinks.

The words "sober and temperate" are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. But if a man use spirituous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of this contract of insurance.

I have said that you should be governed in respect to the matter under consideration by the weight of evidence. And here you should distinguish between the positive and negative evidence. If a number of credible witnesses testify that they have frequently seen a party intoxicated, or visibly under the influence of strong drink, their testimony is not to be rejected simply because an equal number of like credible witnesses testify that they never saw the party in such a condition. The testimony in the one case is positive, in the other negative, and the testimony of both sets of witnesses in the case supposed may be true. Many of the witnesses on the part of the plaintiff say that they never saw Brockway so much under the influence of liquor that he could not attend to his ordinary business. This evidence, however, does not necessarily negative the immoderate use by him of spirituous liquors.

Again, some of the plaintiff's witnesses testify

that Brockway's health was not impaired by his use of intoxicating liquors. But whether or not his health was impaired is altogether immaterial, if, in fact, he was immoderate or intemperate in his indulgence in spirituous liquors.

You are to say upon the weight of evidence, in view of the explanations and instructions I have given you, whether Beckwith S. Brockway was sober and temperate at the date of his answers, and had always been so. If you determine this question against the plaintiff, that will end the case, and your verdict will be for the defendant. But if your finding on this part of the case should be in favor of the plaintiff, you will then pass to the consideration of another branch of the defense.

It is claimed that the policy in suit is what is known as a wagering policy, and therefore void. It is a general rule of law that no one can procure valid insurance upon a life unless he has an interest in that life. I may insure my own life, for I have an interest in it. But an entire stranger to me, one who has no interest in my life as a creditor or otherwise, cannot take out a valid policy on it. Should he procure such policy, the law would condemn it as a mere wager, a bet on my life, a gambling contract, and there could be no recovery thereon. This rule prevails, not in the interest of insurance companies, not out of regard to them. The rule has its foundation in good morals and sound public policy. It has been well said of such wager policies, that, "if valid, they would not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about, if possible, the event insured against." The annals of crime furnish more than one instance where murder has been perpetrated by the holders of such policies, that they might reap the fruits of speculative insurance upon the life of their victim. If an entire stranger to me were permitted to take out insurance on my life, his sole interest, you must perceive, would be in my speedy death. The law, therefore, wisely takes from him the temptation to bring about the event by forbidding such contract. The evils of gambling in such policies are also apparent and great, and therefore the law will not sanction insurance obtained for the purpose of speculating upon the hazard of a life, in which the assured has no interest.

In the present case, as I have heretofore said, the policy on its face appears to be taken out by Beckwith S. Brockway on his own account. But it is claimed it was not intended to be what it purports, but that form was adopted as a mere

cover for a wager policy in favor of Daniel F. Seybert, the use plaintiff in this case.

It appears that Beckwith S. Brockway was a shoemaker, and there is evidence tending to show that he was without pecuniary means. When he died, on December 4, 1869, there was on his life insurance to the amount of \$40,000, which, it is claimed, was out of all proportion to his station in life. There is evidence tending to show that all this insurance was taken by the procurement of Daniel F. Seybert, and for his benefit; that he (Seybert) paid all the premiums that were paid; that Seybert solicited Brockway to take out the policy in suit, and agreed to pay him \$300 for so doing; that he did pay him \$30 in cash, and gave him his two notes for \$100 each.

The defendant claims that the evidence shows that the policy in suit was taken out nominally for Brockway, but actually for Seybert, as a mere matter of speculation upon the hazard of Brockway's life; that it was not a policy upon the life of Brockway taken out in good faith, but a mere cover for a wager policy. If you so find, there can be no recovery upon the policy, and your verdict must be for the defendant.

A creditor, however, has an insurable interest in the life of his debtor, and may take out a policy upon the life of the latter, or the policy may be taken out in the name of the debtor and assigned to the creditor. It is claimed by Seybert that this is the character of the transaction under investigation. He produces, and has given in evidence, a note dated December 26, 1867, for \$10,000, payable to him, or his order, one day after date, and purporting to be signed by Beckwith S. Brockway. He has also given in evidence an assignment dated March 30, 1868, from Brockway to him (Seybert), for \$8,000 of the policy in suit.

He claims, you perceive, to be the creditor of Brockway, and that he was such at the time this policy was taken out, and that it was procured on account of that indebtedness. If Brockway was indebted to Seybert, as claimed by him, in the sum of \$10,000, and the policy was taken out with reference to that indebtedness, then it was not a wager policy, and this branch of the defense (if you so find the facts to be) would fail.

Are you satisfied that there was such indebtedness? The note for \$10,000, purporting to be signed by Brockway, is in evidence, but its genuineness is controverted. It is for you to determine, under all the evidence, whether or not the signature to the note is the genuine signature of Beckwith S. Brockway. But if you should find that it is his signature, the vital question still remains whether it represents a

bona fide indebtedness. Did Brockway actually owe Seybert \$10,000? or is this note but a part of the alleged confederacy between Brockway and Seybert, whereby the latter was to take out a merely speculative insurance upon the life of the former?

Upon this branch of the case Seybert relies upon the note itself, and has given no other evidence to show the alleged indebtedness, or how or when it originated. Mrs. Cooper testifies that she was present when the note was signed; but she is silent as to everything beyond the mere fact of the signing of the note by Brockway. In the absence of any testimony by Mrs. Cooper as to the payment of any money by Seybert to Brockway, or the passing of any consideration at the time the note was executed, it is reasonable to assume that no consideration then passed between the parties. I cannot recall any evidence whatever, aside from the note itself, tending to show the alleged indebtedness.

The defendant insists that, in view of Brockway's pecuniary circumstances and his station in life, it is highly improbable that he could be *bona fide* indebted to Seybert for so large an amount as \$10,000. It is further urged that if any such indebtedness in fact existed, it was in the power of Daniel F. Seybert, the use party plaintiff, to show that indebtedness, to prove the consideration for which the note was given, and that the entire absence of such evidence raises a strong presumption against the *bona fides* of the note. It is for you to say what weight should be given to these considerations, which the defendant's counsel have pressed upon you.

The case, as submitted to the jury, turns upon the determination of two questions of fact. The one relates to the habits of Brockway in respect to sobriety; the other has regard to the character of the policy in suit.

1. Was Beckwith S. Brockway on March 8, 1868, "sober and temperate," and had he always been so?

2. Was the policy in suit a *bona fide* risk upon the life of Brockway, or was it merely a speculative transaction on the part of Seybert—a wagering policy?

If you find *both* these questions of fact in favor of the plaintiff, your verdict will be for the plaintiff. But if your finding upon these questions of fact, or upon *either* of them, is against the plaintiff, your verdict must be for the defendant.

For plaintiff, *Hon. G. M. Harding, Assistant U. S. District Attorney Wilson and Col. Knorr.*
Contra, Messrs. Dalzell, Purviance and Stoner.

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PITTSBURGH, PA., SEPTEMBER 14, 1881.

ADULTERATION OF FOOD AND DRUGS.

[FROM THE IRISH LAW TIMES.]

"What a contrast between now and, say, only a hundred years ago! At that later date, or still more conspicuously for ages before that, all England awoke to its work with an invocation to an Eternal Maker to bless them in their day's labor, and help them to do it well. Now, all England, shop-keepers, workmen, and all manner of competing laborers, awaken as with an unspoken but heartfelt prayer to Beelzebub: Oh, help us, thou great lord of shoddy, adulteration and malfesance, to do our work with the maximum of sliminess, swiftness, profit and mendacity, for the devil's sake, and an amen." So wrote the pungent pen of the late Thomas Carlyle; while Mr. Ruskin, less indisputably, will have it that "it is merely through the quite bestial ignorance of the moral law in which the English bishops have contentedly allowed their flocks to be brought up that any of the modern English conditions of trade are possible." But, traders have to contend with the positive law too, which places a potent veto on contamination and sophistication in most respects, although something more might have been expected to result from the Parliamentary inquiry on the subject of some three years since; while we find that France has made her laws more stringent, Belgium has promulgated a really efficient measure, Spain has appointed inspectors at the ports to prevent the importation of adulterated drugs from England, and Australia has empowered a committee to inquire into the subject. Even in relation to the important conflict of opinion between the authorities of Somerset House and the Society of Public Analysts, as to the proper standard of pure milk (which has already notoriously led to the miscarriage of prosecutions, as in the case of *Pembroke Township Commissioners v. Byrne*, September 1, 1880), the Legislature has not thought fit to intervene; though a precedent for an enactment on the subject may be found in the United States, as we learn from *Commonwealth v. Luscomb*, decided by the Supreme Court of Massachusetts in November last. There the indictment—which was under Stat. 1880, ch. 209, sec. 3, creating the offense of having in possession "adul-

terated milk, or milk to which water or any foreign substance has been added," and section 7, providing "that in all prosecutions under the act, if the milk shall be shown, upon analysis, to contain more than eighty *per centum* of watery fluid, or to contain less than thirteen *per centum* of milk solids," it shall be deemed adulterated—alleged that the defendant had in his possession one pint of adulterated milk, "to which milk, water had been added;" and it was held (without deciding whether the purpose of the act was to prevent the sale of milk found by analysis to fall below the required standard of purity, and whether such milk is to be treated as adulterated, without regard to what may have caused its inferior quality), that under the allegations of this indictment, the jury should have been instructed that the defendant could not be properly convicted, if they were satisfied that the milk in question was as it naturally came from the cow, although they should also find it fell below the legal standard in quality. So that the strict letter of the statute was prevented from operating unjustly to the prejudice of the accused, who escaped for a reason, the converse of that which, according to WILMOT, C. J., procured the acquittal of a Warwick innkeeper, who, being tried for poisoning a customer with noxious "port wine," escaped by proving that there had never been one drop of real port wine in the hogshead. But, we know not what Dr. Cameron would say as to the standard of milk-quality legislatively laid down in Massachusetts. Be this as it may, however, and though milk adulteration is certainly decreasing, there can be no doubt that, as the Local Government Board state in their report for 1879, the money loss sustained by the consumers must amount in the aggregate to an enormous sum—London alone paying between £70,000 and £80,000 a year for water sold under the name of milk; figures which, large as they are, need surprise us little when we remember that returns obtained from the railway companies show that nearly twenty million gallons of milk are now brought to London annually by railway, in addition to a considerable quantity either produced within the metropolitan area, or brought thither otherwise than by railway.

In reference to this transit of milk by railway, the recent case of *Rouch v. Hall*, 6 Q. B. D., 17; 50 L. J. M. C., 6, may be referred to. It appeared that a farmer named Hall, living near Coventry, was charged on April 8, 1880, with having on March 18, at the Euston station, sold, to the prejudice of the purchaser, a pint of milk adulterated with 16 per cent. of water. Hall had contracted to supply milk to a dealer

in London, to be delivered free of charge at the London terminus. On March 18, Mr. Rouch, being at the station, and seeing a milk-can arrive, required a porter to give him a sample, as he suspected the milk to be adulterated, and wished to have it analyzed. He at once gave notice to the porter of his intention to have such analysis made, and handed him a third portion of the sample, thus treating him as the agent of Hall, under section 14 of the Sale of Food and Drugs Act, 1875. Under this section, the person purchasing with the intention of submitting the article to analysis, must forthwith notify to the seller, or his agent selling the article, his intention to have it analyzed by the public analyst. Under section 3 of the Sale of Food and Drugs Act Amendment Act, 1879, any medical officer of health, inspector of nuisances, etc., may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale of such purchaser or consignee of such milk, and "he is to submit the same to be analyzed, and the same shall be analyzed, and proceedings shall be taken, and penalties on conviction be enforced in like manner in all respects as if such officer, etc., had purchased the same from the seller or consignor under section 14 of the principal Act,—i. e., that of 1875. The summons was dismissed by the magistrate, who assumed that the steps made necessary by section 14 of the Act of 1875, ought to have, but had not, in fact, been taken by Mr. Rouch, who, in handing to the porter the third portion of the milk obtained by him for analysis, had not handed it to the agent of the seller. On appeal from this decision in November last, FIELD and MANISTY, JJ., held that section 14 of the Act of 1875 is not incorporated into section 3 of the Act of 1879; that, though the analysis was to be "the same in all respects," those words did not include the proceedings in the earlier stage; and that, while giving the sample to the railway porter was not a compliance with the former section, as he was not the seller's agent, the case came within the latter section, because the delivery by Hall to the dealer in London had not been completed at the time at which Mr. Rouch, a person duly authorized, had procured the sample of the milk; and this had therefore been done in the course of delivery, as required by the Act.

In *Toler v. Grevan*, a point worth noting has been decided by one of the metropolitan police magistrates. The defendant was summoned for refusing to sell to the corporation inspector a sample of milk for analysis; it appeared that the inspector had required the milk to be

taken from a particular vessel, and Mr. O'Donel, holding that the inspector had, in this respect, exceeded his powers, dismissed the case. See, also, as to refusing to give a sample for analysis; under section 4 of the Act of 1879, 14 Ir. L. T., 385; and as to the proper mode of delivering samples to the analysts, see 13 *Id.*, 494. A couple of other recent cases in reference to analysts' certificates, not indeed of high authority, but still useful and suggestive, may here be noticed. In a note to the form of certificate given in the Act of 1875, it is declared that, in the case of articles liable to decomposition, the analyst "shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis;" and on an appeal heard at the Middlesex Sessions, in *Peart v. Barston*, L. T. October 30, 1880, where this requirement had not been complied with, the assistant judge quashed the conviction, observing that it was most important that the very special conditions for the protection of the seller should be minutely observed when legal proceedings were to be instituted. And in a case at Wolverhampton, where the analyst certified that the mixture sold was "practically" chicory (sold for coffee), not defining the quantity, the magistrate held that this was not sufficient evidence of adulteration: 14 Ir. L. T., 479.

In *Horder v. Meddings*, decided by the English Queen's Bench Division in February last (only reported as we can find, in 14 Ir. L. T., 125), the assistant of an inspector went into a grocer's shop and asked for a quarter of a pound coffee. The shop-woman weighed out that quantity of a mixture known as "Symington's coffee," in which way the canister was labeled; and more than three-fourths of it consisted of chicory. The purchaser then stated that he wanted it for the purpose of analysis; and upon that the shop-woman, after consulting her master, labeled the wrapper with the words: "This is sold as a mixture of chicory and coffee." It was urged that the purchaser knew, before the sale was complete, what the mixture was; that he was not "prejudiced;" and that the mixture was not made by the grocer, but bought from a wholesale dealer. LUSH, J., said that to allow it to be a defense that the mixture was made by, and purchased from some one else, would open a wide door for fraud, and, in effect, neutralize the act; and that the purchaser having been told, before the sale was completed, the nature of the mixture, would only afford a defense provided it was not sold with any fraudulent intention to conceal its real nature, on which there should have been a finding by the magistrate.

As to the old objection of the purchaser not being prejudiced, of course it was of no avail since *Hoyle v. Hitchman*, 40 L. T. (N. S.), 252, and the Act of 1869; see, also, *Horder v. Scott*, *infra*. But, certainly, we agree with the learned judge that, considering the large proportion of the adulterating ingredient, there was evidence on which the magistrate might have found that the intention existed, as to which he had omitted to say anything; and unquestionable the public are sorely in need of protection against the many mendacious mixtures that usurp the name of coffee. Nay, if we are to believe M. Vigue, who has recently contributed an article on the subject to a French journal, even the berry itself is simulated in clay or earth, moistened, moulded, dried and colored, or by flour and similar substances mixed with treacle.

Horder v. Scott, 42 L. T. (N. S.), 660, 49 L. J. M. C., 78, is another "coffee" case, in which a very important question was decided last May. It there appeared that H was an inspector, duly nominated and appointed under the Act of 1875. T was an assistant of his, and purchased of the respondent two ounces of the "best coffee," having been directed to make the purchase by H, who was not present. T said the purchase was for analysis, and was told, after the purchase, but before he left the shop, that it was a mixture of coffee and chicory. T handed it to H, who thereupon sent it to the public analyst, who reported that this "best coffee" contained 41 per cent. of chicory. H instituted proceedings under the act against respondent, but the magistrate dismissed the summons, on the grounds that H, having laid the information, should have personally purchased the article, or that T having purchased, should have laid the information, and have submitted the article to the analyst. But, on a case stated, it was held that it was competent for the inspector to employ a deputy to purchase articles for the purpose of analysis; that the inspector might properly institute the proceedings, and that he was the proper person to do so, though an ordinary person might have been originally the person prejudiced; while LUSH, J., said he was unable to see that the respondent's saying the article was a compound of chicory and coffee, would bring her within the protection of section 8 of the Act of 1875. This case was subsequently discussed in *Stace v. Smith*, which we find reported in the *Justice of the Peace* of the 26th ult. There Stace, the sanitary inspector, went with Donovan to a shop where butter was sold, and sent Donovan in, who bought a pound of butter for a shilling. Donovan then gave it to Stace, who had remained outside, and who,

within two minutes, went inside and gave notice to the shop-keeper that he had bought it for analysis, and he then and there divided it into parts, etc. Stace laid the information for selling butter not of the nature, etc., of butter. On a case stated, it was argued that Donovan, and not the inspector, was the purchaser, and that in this case the transaction had been complete before the shop-keeper ever heard of the inspector. But, said COLERIDGE, C. J.: "I think it plain that the conviction must be affirmed. It was clear the inspector was the purchaser, for he sent Donovan into the shop to make the purchase, and this was held in *Horder v. Scott*, to be a purchase by the inspector. The whole proceeding occupied about two minutes, the inspector being outside the shop, and on getting the article he went in and gave the notice pursuant to the statute, and declared his intention. This was all that he was required to do." And FIELD, J., while concurring, said that any other construction of the act would very much cripple it in practice.

To cripple the operation of the Adulteration of Food and Drugs Acts in any way would, indeed, be calamitous. But, so far, we are glad to find that the cases have tended in a quite contrary direction. In some previous papers (13 Ir. L. T., 205, 465, reprinted, by the way, in the *Edinburgh Journal of Jurisprudence*), we discussed the only other decisions upon those acts yet reported, and our readers are now in a position to acquaint themselves without trouble with the whole law upon this important subject. That it is not effective enough to stamp out a grievance so disastrous to the entire community must, indeed, be admitted, and we understand that, since our former papers on this subject, a petition for presentation to Parliament has been prepared, and is being extensively signed here, praying for the adoption of a further remedial measure. Nor is further protection needed in respect of food alone—adulterated drugs are, if possible, a worse abomination. And if no other means is to be found of putting an end, at all events, to the supplying of our poor-law unions with plaster of Paris "sulphur," and "tincture of cinchona," only containing three-fourths of the amount of extract it ought to contain, while without any saffron whatever (as appeared in a recent instance), we only wish that drugs in future might be tested on the druggist; as the Holstein peasant, when he killed a pig, used to send a sausage to his pastor, waiting the consequences for fourteen days, when if the pastor continued healthy, the rest of the animal was disposed of without unpleasant trepidations about trichinae.

Supreme Court, Penn'a.

CLOW, to use, v. DERBY COAL COMPANY.

A was the owner of two mortgages covering certain land, which was also subject to the lien of a judgment in favor of B, subsequent to the first and prior to the second mortgage. A writ of error having been taken to the judgment, a *supersedeas* bond was given; and A, in pursuance of his agreement with the mortgagors made before the judgment was obtained, and also in consequence of an impression that the bond made him safe in so doing, satisfied his first mortgage. Default was made in payment of interest on the second, and suit brought; but, in the meantime, the mortgagors had discontinued the writ of error and execution was at once issued on the judgment, whereupon the mortgagees purchased it.

Notwithstanding the fact that the principal obligors in the bond had assured A that he should be amply protected in these proceedings, it was held, in a suit by A on the bond (which had been assigned to him with the judgment), that, the price obtained for the property in the sale under the mortgage being in excess of the amount of the judgment, it was thereby satisfied. Therefore, no recovery could be had against the bail in error. Whatever equity A might have against the principal obligors, growing out of their representations to him, and out of his mistake in satisfying his first mortgage, he could have none against the sureties.

When the property was sold under the mortgage, A had a special return made in his favor as mortgagee, without opposition. Held, that this did not avail him in the case in hand, for the reason that, when a creditor has the means of satisfaction from the property of the principal in his power, and fails to avail himself of it, the surety is discharged.

Error to the Court of Common Pleas of Centre county.

The Derby Coal Company, in order to obtain relief from certain pecuniary embarrassments, agreed with Casanova that, in consideration of the sum of \$130,000 cash, to be paid by him, they would (among other things) extinguish a certain mortgage debt of \$150,000, then on their property; and that, upon the complete execution of the arrangement, they would execute to him a new mortgage of \$250,000, to have the same security as the other. He was to be accorded the fullest protection for its payment, with the right to foreclose on default in payment of interest, or if other claims should be presented and enforced against the company. The money was duly paid by Casanova, the outstanding bonds obtained from the holders and given to him, and the new mortgage of \$250,000 executed and delivered; but it was not recorded and the other satisfied, as intended, because Clow, a citizen of New York, had begun suit in the Circuit Court of the United States, at Pittsburgh, against the company. This resulted in a judgment for plaintiff for \$29,961.03. The company took out a writ of error in the Supreme Court of the United States to the Circuit Court,

and gave a bond, with sureties, for the payment of debt, interest and costs, which bond was the subject of this suit, and in which the defendants in error were the obligors. Casanova, being assured that this bond would fully protect him, even in case of the affirmance of the judgment, allowed the first mortgage to be satisfied, the bonds to be cancelled, and the new mortgage to be recorded. The interest, however, was not paid when due, and Casanova began suit to recover it, whereupon the company, by counsel, had the writ of error dismissed. This was immediately followed by execution on the Clow judgment, the company waiving inquisition and agreeing to condemnation of the property covered by the mortgage. In order to prevent sale, Casanova was obliged to buy the judgment; and, having done so, he proceeded with the suit on his mortgage, obtaining a judgment, selling the mortgaged premises and having a special return made in his favor without opposition. This was in Clearfield county. The Clow judgment being thus apparently unsatisfied, he brought suit on the bond in Centre county.

At the trial, the court directed a verdict for the defendants. This was assigned for error, together with the refusal of evidence of the above facts, offered for the purpose of showing that the mortgage sued out should be for the purposes of the suit treated as a first lien.

Counsel for the plaintiff in error argued, that the Clow judgment was not really paid, although its lien was first on the record. The distribution was in favor of the mortgage, and cannot be collaterally impeached: *Yerk's Appeal*, 8 W. & S., 225; *Noble v. Cope*, 14 Wright, 18; *Gratz v. Bank*, 17 S. & R., 278; *Finnell v. Brew*, 31 P. F. Smith, 366.

The sale of the property is a payment of the defendant's debts to that amount, but what creditor's debt it will extinguish is a question to be settled only by final distribution and appropriation. The sale and receipt of the money by the sheriff are not *per se* a satisfaction of any particular incumbrance, though its lien may be extinguished: *McDivitt's Appeal*, 20 P. F. Smith, 376; *Bank v. Wiryer*, 1 Rawle, 301. In distribution regard must be had to the equitable status of the different lien creditors, as well as to their legal status in point of time: *Selden's Appeal*, 24 P. F. Smith; *Rice's Appeal*, 29 P. F. Smith, 182. A creditor may be displaced to make room for a lower one by reason of a superior equity in the latter: *Erb's Appeal*, 2 Pa. St., 276; *Hein v. Barnitz*, 8 Watts, 39; *Worrall's Appeal*, 5 Wright, 524; *Barnes' Appeal*, 10 Wright, 350; *Rice's Appeal*, 29 P. F. S., 185.

Either the distribution made in Clearfield

county could not be impeached in Centre county, or, if that could be done, evidence to show the superior equity of Casanova ought to be admitted. That evidence would have shown that the first mortgage was satisfied because of representations by some of the defendants that the bond in the Supreme Court made the second equally secure. The principle that a surety is discharged by an alteration of the contract can have no application here, for Casanova already had a first lien. If the arrangement had not been made, the sureties would have been in no worse position, for the mortgage would then have been sued out, and Clow would have undoubtedly been postponed to that.

Counsel for the defendants in error argued that the sale of the real estate of the company satisfied the judgment of R. F. Clow. It is of no consequence that it was sold to Casanova, the plaintiff in the proceedings on the mortgage. If sold to a stranger, the law would appropriate the proceeds to the liens, according to their priority. As in this case, without any legal distribution being made to the contrary, the Clow judgment was paid. Casanova, being the owner of the second lien, could not have appropriated the proceeds of the sale to his judgment to the exclusion of the first lien, if Clow had still been the owner of it: *Fleming v. Beaver*, 2 Rawle, 128; *Selden's Appeal*, 24 P. F. Smith, 327; *Kohl v. Hastings*, 8 Watts, 320; *Hepburn v. Snyder*, 3 Barr, 72; *Talmage v. Burlingame*, 9 Barr, 21; *Bellas v. Vanderslice*, 8 S. & R., 452; *Bank v. Macalester*, 6 W. & S., 149.

The acts of Casanova in raising the money, and his attempt to postpone the first lien, of which he was then the owner, were sufficient to release the sureties on the bonds: *Neff's Appeal*, 9 W. & S., 36; *Holt v. Rody*, 6 Harris, 207; *Wharton v. Duncan*, 2 Norris, 40.

For plaintiff in error, *Messrs. David L. Krebs and Adam Hoy*.

Contra, Messrs. G. A. Barrett, Samuel Linn and Beaver & Gephart.

Opinion by SHARSWOOD, C. J. Filed June 22 1881.

This was a joint action against the defendants upon a joint and several bond. The plaintiff might have instituted a several action against each, but, as it stands, he must recover against all or none. Curtin and Wallace were sureties. It is alleged that the others were stockholders of the Derby Coal Company, and what the equities of the use plaintiff were, or would have been, against them under the offer of evidence made in the court below, it is unnecessary to inquire. The plaintiff claimed to recover against

all the defendants. The question then is, had he a right to recover against those of the defendants conceded to be sureties, whatever may be the case as to the others. Clow, the legal plaintiff in this suit, which is marked to the use of Casanova, had recovered a judgment against the Derby Coal Company, in the Circuit Court of the United States, of the Western District. Upon this judgment a writ of error was taken out of the Supreme Court of the United States, and to procure a *supersedeas* of execution the bond in suit was executed by the defendant. The writ of error was dismissed, and the bond became absolute. Casanova had made a contract with the Derby Coal Co.—and he offers to prove that two of the defendants were parties, and assenting thereto—by which he was to advance a certain amount of money to the company, from which certain bonds, secured by mortgage to Allan Hay, trustee, were to be extinguished, and a new mortgage given to him. In pursuance of this arrangement, satisfaction was actually entered on the Allan Hay mortgage, and the new mortgage given. The legal effect of this was that the Clow judgment became the first lien upon the lands of the company. Proceedings were instituted upon the second mortgage, and a sheriff's sale had, the proceeds of which were appropriated to that mortgage, no claim having been made on the Clow judgment. In point of fact, Casanova had purchased the Clow judgment, and was the owner of the same. An issue was awarded between him and one Finney to try the right of the latter to a part of that judgment, and a verdict rendered in favor of Finney. It is agreed that Casanova also purchased his right. This was a proceeding collateral to the question of distribution, and could have no legal conclusiveness, except as between the parties to it. The question then is resolved into this, whether Casanova, as owner of the Clow judgment, having had a clear right to payment out of the fund raised by the sheriff's sale, and having neglected to avail himself of it, is not precluded in equity from recovering against the sureties on the bond in suit. If the creditor has the means of satisfaction from the property of the principal in his power, and fails to avail himself of it, the surety is discharged. The plaintiff concedes this, but sets up a countervailing equity, which, he contends, overcomes it. It is comprised in his offer of evidence which was rejected by the learned court below, which rejection forms the subject of complaint in the third assignment of error. In substance, he contends that under the circumstances he is entitled to have the satisfaction of the Hay mortgage set aside or disregarded, so as to re-establish the priority of

the lien of that mortgage, and to appropriate all the proceeds of the sale on the second mortgage towards payment of it. No fraud is alleged. No mistake of such a character as would justify the interference of a court of equity. It is, indeed, probable that the Hay mortgage was satisfied upon the mistaken idea that the Clow judgment had lost its lien by the writ of error to the Supreme Court. It would have been wiser if Casanova had been advised to take an assignment of the Hay mortgage instead of having it satisfied of record. This is not such a mistake, however, as a court of equity would interfere to rectify as against sureties, who have, at least, an equal equity. When satisfaction was entered on the Hay mortgage, it was the intention of Casanova to extinguish it. It is true he alleges and offered to prove that Anderson and Soteldo, two of the obligors, were stockholders of the Derby Coal Company, and agreed and accepted the proposition in writing from him to give him the fullest protection possible for the payment of the second mortgage, and that Clow was also a stockholder, and had notice of that mortgage. But no offer was made to show that Curtin and Wallace had made any such agreement, or even had knowledge of it. No countervailing equity, therefore, was shown as against them. We think that the learned court below were perfectly right in rejecting the evidence offered, and directing a verdict for the defendants.

Judgment affirmed.

SHAKESPEARE v. THE FIDELITY TRUST CO.

A foreign executor cannot sue in this State without local administration under the Act of 1832.

Whether a foreign executor can receive a voluntary payment without suit, has never been decided in this State, and is not now decided.

United States coupon bonds, deposited in the Fidelity Trust Company, Philadelphia, by a citizen of New Jersey, who receives a certificate therefor, are not, on his decease, part of his estate in Pennsylvania.

Even though the bonds were not in New Jersey, yet they were assets in that State, though they were physically deposited in Pennsylvania by decedent, and remained there at his death.

Error to the Court of Common Pleas, No. 1, of Philadelphia county.

Opinion by SHARSWOOD, C. J. Filed March 7, 1881.

This case has been very ably and elaborately argued, and all the authorities examined and commented on. We do not, however, deem it necessary to discuss the several questions presented. The main contention of the plaintiff in error is grounded upon the provisions of the 6th section of the Act of March 15, 1832, P. L., 136, that "no letters testamentary or of administration or otherwise, purporting to authorize any

person to intermeddle with the estate of a decedent, which may be granted out of this Commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this State." In speaking of this act, Mr. Justice WOODWARD remarked, in *Moore v. Field*, 6 Whart., 471: "This section of the Act of 1832 suggested to the minds of the codifiers, by what was said in *McCulloch v. Young*, 1 Bin., 63, was merely declaratory of the common law, according to which the title of executor or administrator cannot *de jure* extend beyond the territory of the government which grants it and the moveable property therein." It has been earnestly maintained that upon the proper construction of the statute, the foreign executor or administrator not only cannot sue in the courts of this State for any of the debts or assets of the decedent, which certainly must be conceded to be settled, but that he cannot receive or give a valid acquittance upon a voluntary payment or delivery, even when it does not appear that there are any domestic claimants upon the estate. The current of authorities where the rule of our statute is recognized as the common law does not sustain this position: *Williams v. Staws*, 6 Ch. Rep., 357; *Parsons v. Lyman*, 20 New York, 112; *Klein v. French*, 57 Miss., 667; *Wilkins v. Ellet*, 9 Wall. S. C., 740. The point has never been decided in this State. We do not think it necessary to decide it in this case. There is another point which we think disposes of the question upon this record. We do not consider the U. S. coupon bonds, which are the subject of the controversy, were, at the time of the death of the decedent, any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were therefore in the possession of the decedent. He held the certificate of their deposit. The defendants were bound to restore the bonds at any time to the lawful holder of the certificate. It was as if the bonds had been placed in a fire-proof of the defendants, of which the decedent held the key. In point of fact, the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it, as she was bound to do, to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her and compelled its delivery to him. The Pennsylvania administrator certainly could not. By the terms of the certificate, it might be transferred by assignment indorsed thereon, and approved by the company. The foreign executor could have so assigned it, and his assignee could have sued for delivery of the bonds in his own

name. The assignment would have been a sale of the bonds, which were payable to bearer and passed by delivery. Whoever showed a legal title to the certificate had a right to the possession of the bonds. The case then is within the principles of *Moore v. Field*, *supra*, where it was held that where a debt, fixed by a decree or judgment of the court of another State in favor of a foreign administrator, is due by a citizen of Pennsylvania to the estate of the decedent, the administrator of the foreign domicile may sue for and recover it in his own name.

WAGENSELLER v. SIMMERS.

A contract to marry without specification of time is a contract to marry within a reasonable time.

The age of the parties and the pecuniary ability of the man to support a family are proper matters to consider on the reasonableness of the delay in a particular case.

A refusal to fulfill a contract to marry may be as unmistakably manifested by conduct as by words. The true question is whether the acts and conduct of the defendant evinced an intention to be no longer bound by the contract.

This is the correct rule in cases of sales of personal property; and it applies with greater reason to a marriage contract, which should rest on mutual affection.

It is not necessary that the plaintiff should offer to marry the defendant and he expressly refuse, if the acts and declarations of the defendant dispense with the necessity of the request, or show that he broke the contract. Although, before suit, the plaintiff may have written a letter to the defendant in which she says "I don't want you," but, at the same time, informs him of her intention to hold him liable for his breach, she will not be deemed to have released the defendant thereby.

Error to the Court of Common Pleas of Chester county.

This was an action on the case in the court below, by Emma Simmers, against James Wagenseller, for damages for the breach of a contract of marriage. The cause was tried before Judge FURLEY, and resulted in a verdict for the plaintiff for \$5,000, reduced by the court below to \$2,000, for which sum judgment was entered.

The facts sufficiently appear in the opinion of the court. On the trial, the defendant, *inter alia*, presented the following points:

5. That to support the action of a breach of promise of marriage, if the defendant has not married another (in this case he has not), the plaintiff must show that she offered to marry the defendant, and he refused. If she does not so show, the verdict must be for the defendant.

Ans. This point is not affirmed. If the evidence satisfies the jury that the defendant broke this engagement of marriage, and that fact is shown either by the words or acts of the defendant, it is not necessary that the plaintiff should have made an offer to marry the defendant before bringing suit. (Exception and first assignment of error).

11. In order to entitle the plaintiff to recover for breach of promise, when the time between the cessation of the visits of the defendant to the plaintiff and the time of bringing suit has been so short as in this case, not over two months, and where the defendant has not married any other person, or, from the evidence, solicited any other person to marry him, the plaintiff must prove that she demanded of the defendant the fulfillment of his contract, and that he refused to do so. This was answered substantially as the next preceding point. (Eighth assignment of error).

6. If no time is fixed and agreed upon for the performance of the contract, and no request is made by the plaintiff upon the defendant, the defendant is entitled to your verdict. *Ans.* If no time is fixed for the performance of the marriage ceremony, if an agreement of marriage took place, the law presumes that it is to take place in a reasonable time, and it was not necessary for the plaintiff to make any request, if the defendant, by his words or acts, dispenses with the necessity for making the request. (Third assignment of error).

10. If the plaintiff wrote the letter wherein she states, with other matters, that she would not have the defendant, and made other personal and offensive remarks about the defendant such as would mortify his feelings, the defendant is entitled to your verdict. *Ans.* This point is not affirmed. (Seventh assignment of error).

Opinion by MERCUR, J. Filed May 2, 1881.

Three grounds of defense are taken by the plaintiff in error. First, he never promised to marry; second, he did not refuse to marry; and, third, that she released him from his promise to marry. These different defenses may have appeared rather inconsistent to the minds of the jurors. As he appears to have urged each with equal persistency, if they were clearly satisfied that he did promise, they may have given less weight, than they otherwise would have done, to his evidence bearing on the other points. If so, he has no just cause of complaint at a result produced by his own evidence.

1. The evidence to prove the contract of marriage was most ample to submit to the jury. It consisted, in part, in showing that he began to visit her in March, 1877. From that time until October, 1879, except during a few weeks, in January, 1878, he visited her from one to three times a week. He took her to pic-nics and celebrations, and to and from church. He kept her private company at her house, usually remaining until twelve o'clock at night. He also took her out riding, and gave that special attention

which is considered evidence of the existence of a marriage contract. She further swore that in October, 1877, he expressly promised to marry her and she to marry him; that he gave her a ring in recognition of their engagement; that this was followed by his presenting her with other small articles at different times. She further testified that he renewed his promise of marriage on Sunday evenings.

2. The evidence of his refusal to marry is not so express and direct. The question is whether his conduct, and all the attending circumstances justified the jury in finding a refusal.

A contract to marry without specification of time is a contract to marry within a reasonable time. Each party has a right to a reasonable delay; but not to delay without reason, or beyond reason. The age of the parties and the pecuniary ability of the man to support a family, are proper matters to consider in the reasonableness of the delay in a particular case. In this case the woman was twenty-three years of age when the plaintiff in error first became her suitor. He was several years older. Her pecuniary means were quite limited. She was at service as a domestic servant. He was a well-to-do farmer, worth from \$10,000 to \$12,000. In view of the reasons which usually influence persons to enter into the marriage relation, these facts had some tendency to prove her willingness to marry, and that he had no just reason for postponing it. In fact, he gave no reason for postponing it during the two whole years. She testified that he passed the evening of October 4, 1879, in her company, remaining until after twelve o'clock; that he left promising to call the next Sunday and take her to church. He came not. She had understood they were to be married the next winter. She soon heard that he was paying attention to another lady.

The second Sunday passed without his coming. She then wrote him, expressing her regret at his not keeping his promise, and her grief and pain at his neglect of her, and at his attention to another girl, and asking his forgiveness for some remark she had previously made. To this letter he made no reply, and never visited her after the previous 4th of October. Sunday evening thereafter, she saw him at church in company with a young lady, and both looking at her in an insulting manner, but without speaking to her. This abrupt abandonment of her, his continued and persistent neglect of her, his assuming intimate relations with another lady and paying her marked attentions, his treatment of her in public, were all proper evidence from which the jury might find his refusal to marry. It was not necessary that he should

say to her in express words: "I will not marry you," nor that she should run after him and say: "I entreat you to marry me." Marriage is a civil contract. A refusal to fulfill it may be as unmistakably manifested by conduct as by words. The true question was whether the acts and conduct of the plaintiff in error evinced an intention to be no longer bound by the contract. This has been held a correct rule in case of an agreement of sale of personal property: *Freeth v. Burr*, L. R., 9 C. P., 208. We think this rule applies with greater reason to a marriage contract, which should rest on mutual affection. His denial that he had ever promised to marry her was of itself very strong evidence of a refusal. Coupled with his acts and persistent conduct, it fully justified the jury in finding a refusal.

3. The last position of the plaintiff in error is that she released him from his promise. This is claimed to be proved by the letter she wrote him on November 30, 1879. It is true, that letter does not express a desire to marry him, nor an existing affection for him, and she does say "I don't want you." Regard, however, must be given to the whole letter, and to the time when, and the previous and existing facts which led to it. Relying on his promise of marriage, she had avoided the society of other gentlemen for two whole years. Her youth was passing. She had not received any answer to her letter of October 16. She saw him weekly in the society of another. She thought he treated her with scorn and contempt. She recognized his conduct as unequivocal evidence of his refusal to marry her. Under these circumstances, it is very natural that all the bitter and angry feelings of a woman's nature should be aroused. She makes no pretense of a continuing affection; yet she does not indicate any intention of releasing him from his legal obligation for refusing to marry. Thus she says: "You always promised me you would marry me, and I have been told by dozens of people to sue you and get some of your money." Again, "As you have so much of it [money] I send a letter away to-day and I am waiting for an answer." "There are plenty of lawyers." "Now I am going to use you as bad as the law will allow me to do it." Thus, instead of notifying him that she has released him from his marriage contract, she reminds him of the position in which he has placed himself, and of her determination to hold him responsible for his breach of contract, and to resort to the law to punish him and to recover her damages.

The whole case was well and clearly presented by the learned judge. We discover no error in the record.

Judgment affirmed.

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PITTSBURGH, PA., SEPTEMBER 21, 1881.

Supreme Court, Penn'a.

LYNCH'S APPEAL.

A decree of a court of equity rescinding a contract for the sale of land, should be made only on the ground of mutual mistake or misrepresentation and fraud; unless the evidence of these be so clear as to leave no room for hesitation or doubt in the mind of the court, the parties should be remitted to their legal remedies.

A chancellor may refuse to enforce the execution of a contract on the ground of improvidence, surprise or hardship; but should rescind a contract only for fraud, illegality or mistake.

If an agent of the vendor attempt to impose on the vendee by representations which he ought to have known to be false, and which he did not know to be true, and the vendee falsely state the object of his purchase, in order to get a better bargain, neither of the parties act fairly, and a chancellor should refuse to interfere either to execute or rescind the contract, but should leave the parties to any legal remedies they may have.

Appeal of I. V. Lynch, J. C. Miles and John W. Miller from a decree of the Court of Common Pleas of Luzerne county.

Bill in equity, filed by Victor Koch against I. V. Lynch, J. C. Miles and John W. Miller, praying that certain articles of agreement for the sale of land by defendant to complainant be rescinded, and the moneys paid thereon be returned, on the ground of the misrepresentations of W. H. Stanton, the agent of the defendants.

By the articles of agreement the defendants sold to the complainant for \$6,000, to be paid in installments, "the coal in and upon and under the (described) tract of land, with all the privileges of mining and transporting the same, with the full and free right to enter upon said land, sink shafts," etc.

The answer alleged misrepresentations on the part of the plaintiff, and denied the authority of Stanton.

George R. Bedford, the Examiner and Master, reported as follows upon the law and the facts:

The defendants, being the owners of a piece of land in the township of Blakely, containing about a hundred acres, sold the surface of the same to a third party, reserving the coal. Upon the suggestion of one W. H. Stanton, that he thought he could find a purchaser of the coal, the defendants, or at least one of them, said to

Stanton, that if he could bring them a customer they would pay him for it. Stanton negotiated with several parties, and finally, on the 2d September, 1873, with Koch, the plaintiff, to whom he stated that the coal was for sale, and that Koch could buy it at a bargain, and proposed that they should together visit the premises, some five miles distant, which they proceeded to do the same day. Arrived upon the ground, Stanton, claiming to be familiar with coal lands, asserted that there were three underlying veins of coal, though it was apparent that there was no development of the land, or evidence of its having been subjected to any test to determine the existence or non-existence of coal. Koch, however, was evidently impressed with Stanton's sagacity, and put entire faith in the latter's opinion. Together they went the next day to see Miles and Lynch, two of the defendants, and on their way there it was arranged between them that Koch should represent that he wanted to buy the place for the purpose of a summer resort, and was indifferent as to the coal, except that he would not want to be annoyed by parties prospecting for it, under an outstanding mining right, and therefore would like to purchase the defendants' interest in the same. At the interview with the two defendants named, the plaintiff offered to buy and pay four thousand dollars, and put his offer on the ground already suggested, namely, to get rid of an outstanding mining right. At this time no representations were made as to the coal, except that to Koch's question as to how much coal there was, it was answered one hundred acres; and when he said Stanton stated there were one hundred and four acres, one of the defendants replied that there was a little over one hundred acres, "but we only guarantee one hundred acres." This answer, it is evident, had reference to the area of the tract. The offer of four thousand dollars was declined, and it was arranged that all parties, including Mr. Miller, the other defendant, should meet next day in Scranton. In pursuance of this arrangement, the parties came together in Scranton on the 4th of September, 1873, and the defendants offered to take six thousand dollars. The plaintiff demurred to the price, and raised his offer to five thousand dollars, which was declined by defendants, one of them (Miles) saying, that if the others chose to sell for less, he would prefer to retain his interest with Koch. Such an arrangement Koch said would not suit him, and after some further discussion by all parties, the defendants asserting their belief of the existence of coal, and one of them stating that he had been informed by a practi-

cal miner, who had seen the property, that there were three veins of coal upon it, Koch acceded to the defendants' terms, and the parties the same day entered into the agreement for the sale on the one hand, and the purchase on the other, of the coal upon the premises mentioned. The price to be paid was about sixty dollars per acre; while as high as three hundred and fifty dollars per acre had been obtained for other coal lands in the vicinity. Upon the execution of this contract, Koch paid the defendants the sum of five hundred dollars. Shortly after this transaction the plaintiff had the property examined, and it was established beyond much question, and shown by the testimony taken in this case that there is and was only from five to seven acres of coal, and this in such condition as not to be workable, and therefore worthless. Upon making this discovery, the plaintiff at once asked to be relieved from his undertaking; and to April Term, 1874, filed this bill for a decree rescinding the contract, and for the re-payment of the money paid thereon by plaintiff.

The first question to be determined is, how far Stanton had authority to bind the defendants by his representations to the purchaser. Now his agency it is pretty clear, was a limited one, and did not extend to consummating the sale, or even to fixing its terms. This is inferable from the whole evidence, and, among other things, from the fact that he brought the parties together, and they themselves thereafter conducted the negotiations and agreed upon the details, without Stanton's assuming in any way to act in their behalf. The arrangement, however, with Stanton, to bring a customer, would of necessity involve the idea that he should show the property to parties proposing to purchase, and make statements regarding it. In this respect he may have far exceeded his instructions, but this is immaterial; for a principal, though not cognizant of his agent's representations, is so far bound by them that he cannot enforce a contract induced by the agent's fraudulent or untrue statement, upon the truth of which the purchaser had a right to rely: Wharton on Agency, §§ 158, *et seq.*, § 478, and cases cited.

Granted, for the purpose of the present discussion, that the proposition that Stanton should find a customer, was unknown to two of these defendants, or even that he acted so far without any authority from either one of the three, it does not, in the light of the authorities, as the Master conceives, alter their liability if they have profited by his acts. It cannot be denied that the sale was brought about in a large meas-

ure, if not altogether, by his efforts. The defendants accept the benefits *cum onere*. One cannot take the fruits of a transaction and reject its burden; and for this reason courts hold that a principal, who has profited by the frauds of even a *volunteer* agent, may be held responsible for such frauds, so far as he has had any advantage from them. Reaping the benefits is equivalent to express ratification. The cases upon this point are, to a considerable extent, collected in *Mundorff v. Wickersham*, 13 P. F. S., 89. See also Wharton on Agency, § 89.

The conclusion of the Master is, that the relations of Stanton with these defendants were such that he could bind them by his representations in the course of his negotiations with the plaintiff.

The next inquiry is, did the plaintiff rely on the representation made by Stanton, that there was coal in the quantity named, and was he, by reason thereof, induced to enter into the contract of purchase? It is urged by the defendants that from the fact that plaintiff made inquiries from Mr. Pierce as to the value of lands in the neighborhood, and what sum the latter had sold for, it is evident that the plaintiff was not induced to purchase solely by reason of the representations made by Stanton, but was largely influenced by the answer of Mr. Pierce, that he had sold for three hundred and fifty dollars per acre. It does not, however, satisfactorily appear that the conversation with Mr. Pierce preceded the plaintiff's purchase, and indeed the probability is that it was subsequent; for the bargain between the parties was fully consummated the next day but one after plaintiff's attention was first called to the property, and the interval of time was pretty fully occupied by the negotiations between the parties, who lived some ten miles apart, and who necessarily traveled over this distance to and fro in the course of the transaction.

Upon the showing made before him, the Master feels bound to decide that the plaintiff was induced to enter into the contract for the purchase of the coal on the premises mentioned in it, by the representations of Stanton that three veins of coal in fact existed over the whole tract. The Master does not attach any importance to the remark of one of the defendants already quoted, that there were one hundred acres, for he is satisfied that such remark had reference to the size of the tract rather than the quantity of coal, and was not misunderstood by the plaintiff.

It being determined that the defendants were bound by Stanton's representations, and that the plaintiff, relying upon them, was induced

to enter into the contract, it is next in order to decide whether the plaintiff is estopped from obtaining the relief prayed for, by his statement to defendants, that he wished to purchase for a summer resort, and that his contemplated purchase of the coal was but incidental, and to avoid any annoyance from parties claiming to own it. Good faith on the part of a party seeking relief in equity, is a fundamental condition. It is clear that it was coal, and the coal only, that the plaintiff desired to purchase, and if his statement to the contrary, made to the defendants, actually misled them, he would hardly be in a position to ask the interference of a court of equity, but from the outset that the real purpose of plaintiff was to buy coal was known to Stanton, who was in some sense the defendants' agent. That such was plaintiff's object, must have been apparent to the defendants also. The principal discussion between the parties themselves, particularly at the last interview, was about coal, and it would be a reflection on the shrewdness of these defendants to say, that they were deceived by the talk about a summer residence. The fact then, that the plaintiff did not, at his first interview with defendants, state truly the object of his purchase, is not regarded under the circumstances as material, and therefore does not estop him from maintaining his bill in this case.

This brings us to consider the last, and manifestly the most important question in the case, and that is, what is the effect of Stanton's representations? That the plaintiff purchased on the strength of such representations, and that they were untrue in point of fact, we have already decided, but it is not every misrepresentation of a fact that will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it. Now, the Master confesses that during the whole progress of the case, his impressions on this point were all against the plaintiff, and with the defendants, and that the rule of *caveat emptor* applied. This view was strengthened by the language of the present Chief Justice in the case of *Watts v. Cummins*, 9 P. F. S., 91. In that case the agent of the vendors asserted the premises to be oil territory, and in fact it turned out to be worthless, and Judge AGNEW said: "Had Campbell (the agent) expressed the strongest belief of the existence of oil in the tract, as an absolute certainty, still the defendant knew it was but matter of mere belief and uncertain. It was opinion only, no matter how confidently expressed. It is plain he had no right to rely upon it as an assured fact, but must still experiment to find it out."

This language is comprehensive enough to govern the disposition of the question in controversy here, but an examination of the case cited shows that the circumstances were peculiar. The contest was between persons who were all parties to a speculation in oil lands, and the court declared "that all knew that they were bargaining about a matter altogether problematical." As matter of fact, too, in the case cited, it appears that the agent, whose misrepresentations were the ground of defense to recovery of purchase money, did not assert the existence of oil as a fact known to him, but that he said it was "oil territory." The language of the opinion therefore would seem to go further than was required by the circumstances of the case, and when we add to this that the decision was made by a divided court the opinion loses something of its force when applied to the facts of the case now under consideration. Coal is less an unknown quantity than oil, and not so entirely speculative. It may, therefore, well happen that a different rule should obtain. Perhaps a case more analogous to the present one than *Watts v. Cummins*, both as to subject matter of the contract and the attendant circumstances, is that of *Fisher v. Worrall*, 5 W. & S., 478, where it is held substantially that a misrepresentation by a vendor of an occult quantity in land, although made in ignorance of the truth, and although the vendee agrees to run the risk of this, is, in an action to enforce specific performance of the contract of sale, a decisive objection to the plaintiff's recovery. The action there was one of covenant upon articles of agreement for sale of iron ore lands. The vendor asserted the existence of iron ore in large quantity on the premises, relying upon which the vendee purchased. It turned out that there was none of any consequence, and the vendee declared he would not take the land. The purchaser was himself an iron master, and therefore an expert, and in addition to this it was proved that he had said "he had to take the risk of getting ore," and yet the Court, speaking through Chief Justice GIBSON, relieved the purchaser from his bargain. Judge GIBSON said: "The object of the purchase, induced, as it was, by the vendor's positive assertion of a fact which he at least did not know to be true, had utterly failed," and that "to assert for a truth what a party does not know to be so, is equivalent to the assertion of a known falsehood; and that a chancellor will not execute a purchase where the vendee has relied on the vendor's unfounded assertion." In accord with this decision is the case of *Rosevelt v. Fulton*, 2 Cowen, 130. There the contract was to pay an annuity for twenty

years for use of a coal mine, and it turning out in fact that there was not such a coal mine as was represented, the court awarded a perpetual injunction to restrain the vendor from suing at law for the annuity, and held that the purchaser need not work the mine in order to determine the quantity of coal. The court says: "The question is whether the contract respecting the annuity was entered into on part of the purchaser in consequence of representations which were either fraudulent or untrue in point of fact, and founded on mistake" (pp. 132-3), and adds: "It is not material whether the intent was fraudulent or the representation proceeded from misapprehension or mistake." In *Smith v. Richards*, 13 Peters, 28, complainants filed their bill to rescind their contract for the purchase and sale of a tract of land in Virginia, on which there was a gold mine, alleging fraudulent misrepresentation on part of vendor. The decree of the Circuit Court sustaining the bill was affirmed, on appeal, by the Supreme Court of the United States, the latter court holding that "the party selling property must be presumed to know whether the representation he makes of it is true or false, and that it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud." Untrammelled by the decisions, the Master would hold that the most positive assertion of the existence of coal, where it was apparent to all parties that there was no development of the premises, should be treated as opinion only, and though confidently expressed and relied on by the other party, yet as affording no real ground for relief in equity. He believes, however, that the decisions settle it otherwise, and upon the authority of *Fisher v. Worrall*, *supra*, which the Master concludes is not overruled or even materially modified by *Watts v. Cummins*, and must therefore be regarded as still the correct exposition of the law as held in this State, the Master reaches the conclusion, though with much hesitation, that the plaintiff had a right to rely on the statements made by Stanton as to the existence of coal, and that being untrue, it matters not whether the misrepresentation was intentional or otherwise. The low price of sixty dollars per acre, it is urged, indicates that the purchaser was to take his chances, but the ruling in *Fisher v. Worrall* is, that even an agreement to take the risk amounts to nothing, if the purchaser is actually misled by the representation, and buys on the faith of it. Then, too, on the other hand, it is remarked that the low price of sixty dollars per acre would indicate that the vendors had not much real faith in the existence of coal.

It being determined that the defendants were bound by the representations of Stanton; that they were not true; that the plaintiff had a right to rely upon them, and in fact did rely upon them, and purchased, believing them to be true, it follows that the plaintiff is entitled to have his contract with the defendants rescinded, and the Master, therefore, in conclusion, reports that, in his opinion, it is proper to decree that, so far as said contract remains unexecuted by the actual payment of the purchase moneys, the same be rescinded and delivered to be cancelled; but that the prayer for the repayment of the five hundred dollars be denied.

To this report the defendants filed various exceptions of law and of fact, which were dismissed by the court; whereupon they took this appeal, assigning for error the dismissal of their exceptions, and the confirmation of the Master's report.

For appellants, *Messrs. J. V. Darling, Isaac P. Hand, J. G. Miller and E. P. Darling.*
Contra, A. Ricketts, Esq.

Opinion by Gordon, J. Filed March 21, 1881.

This is a case where the court below in the exercise of its equity powers has undertaken to rescind a contract under seal between the defendants Lynch, Miles and Miller of the one part, and the plaintiff, Victor Koch, of the other part, for the sale of all the coal lying under one hundred acres of land therein described. This could be done only on the ground of mutual mistake, or misrepresentation and fraud, and of these the evidence should be so clear as to leave no room for hesitation or doubt in the mind of the court. If there be any such hesitation or doubt the bill ought to be dismissed, and the parties turned over to their legal remedies. Herein it is, that we think both the Master and the court below fell into a mistake.

The decree was based on certain representations, alleged to have been made by W. H. Stanton, who, as the Master found, was acting as the agent of the defendants in the sale to Koch, but he has not found that these representations were, at that time, known by either Stanton or his principals to be misrepresentations. The Master says: "Arrived upon the ground, Stanton, claiming to be familiar with coal lands, asserted that there were three underlying veins of coal, though it was apparent there was no development of the land, or evidence of its having been subjected to any test to determine the existence, or non-existence, of coal. Koch, however, was evidently impressed with Stanton's sagacity, and put entire faith in the latter's opinion."

It is thus quite obvious that Stanton's repre-

sentations were not and did not profess to be of known facts, but were expressions of opinion only. It is true he may have impressed Koch with the idea that he was an expert, and thus may have given to his opinions a weight which they otherwise would not have had, nevertheless they were but opinions, and were not represented as facts. Indeed such could not well be, for Koch was upon the land, and could, and did see for himself that the land was not developed. He, therefore, knew certainly that Stanton's representations were merely the expressions of his opinions. Then when he met with the defendants in person, they dealt with him at arm's length; they made no representations whatever; they had what they believed to be a coal reservation to sell; to them Koch professed to be utterly indifferent whether it contained coal or not, representing that his object was to acquire their right for the purpose of relieving the surface, which he alleged he was about to buy, from intrusion by those who otherwise might enter to prospect a mine. Under such circumstances as these, a chancellor might well hesitate about the rescission of a solemn contract of the parties. It may be admitted that the agent of the defendants did attempt to impose on the plaintiff by representations which he ought to have known to be false, and which he certainly did not know to be true; on the other hand it is an uncontroverted fact that the plaintiff approached the defendants with a falsehood in his mouth in order to conceal his true purpose, and get their claim for as low a price as possible.

Here then is more than doubt; neither of the parties is acting fairly with the other, hence a chancellor will interfere for neither. Under such conditions he will interpose neither to execute nor rescind their contract, but will leave them to their legal remedies, if any such they have.

But there is another principle involved in this case, which seems to have been overlooked by both Master and court, and that is the wide difference between the facts and circumstances necessary to move a chancellor to refuse the execution of a contract, and those necessary to induce him to rescind it. In the one case interposition will be refused on the ground of improvidence, surprise or even mere hardship; in the other a court will act only on the ground of fraud, illegality, or mistake: *Graham v. Pancoast*, 6 Cas., 89; *Edmond's Appeal*, 8 P. F. S., 220; *Yard v. Patton*, 1 Har., 278; *Stewart's Appeal*, 28 P. F. S., 88; *Rockafellow v. Baker*, 5 Wr., 319.

The Master confesses "that during the whole

process of the case, his impressions on this point were all against the plaintiff, and with the defendants, and that the rule of *caveat emptor* applied." He furthermore says that he reached the conclusion that the plaintiff had a right to rely on the statements made by Stanton as to the existence of coal with much hesitation. This hesitation was overcome by what he supposed the binding authority of *Fisher v. Worrall*, 5 W. & S., 478; and *Smith v. Richards*, 13 Peters, 26. But the former was a case of specific execution, and the latter one of plain misrepresentation and fraud, so that neither was in point. On all authority then this very hesitation should have led him to a different result. It might well be, especially if the testimony of Vanhooser is to be believed, that neither a chancellor nor a court and jury would enforce this contract against Koch, but under all the circumstances, especially in view of the fact that Koch himself approached the defendants with falsehood and misrepresentation, though perhaps they were not deceived thereby, yet as it may have induced them to deal with him differently from what they would otherwise have done, a chancellor will refuse his interposition to relieve him by the rescission of his contract.

The decree is reversed, and bill dismissed at the costs of the appellee.

PHILADELPHIA & READING RAILROAD CO. v. SCHARTEL.

In a suit against a railroad company for damages for injuries caused by defendant's negligence, the court should take the case from the jury if there is no evidence of negligence.

Error to the Court of Common Pleas of Schuylkill county.

Opinion by PAXSON, J. Filed May 23, 1881.

This was an action brought by the widow and minor children of George ScharTEL, deceased, to recover damages for injuries resulting in his death. The declaration alleges that said injuries were occasioned by the negligence of the Philadelphia and Reading Railroad Company, defendants below. The jury having found the negligence, the cause has been removed to this court, and several errors have been assigned to the rulings of the court below. As the seventh and last assignment, if well taken, renders a discussion of the others unnecessary, we will consider it here.

By the defendant's ninth point, the court was called upon to pass upon the sufficiency of the evidence, the point being: "That under all the evidence in this case the plaintiffs cannot recover." The learned judge declined to so instruct the jury upon the ground that it would

withdraw the case from their consideration. This was the object of the point. It was not error to refuse it if there was sufficient evidence of the negligence of the defendant company to submit to the jury. On the other hand, it is equally clear that if there was no evidence, or at most a scintilla, it was the duty of the court to withdraw the case from the jury and give a binding instruction to find for the defendant. The authorities upon this point are numerous; it is sufficient to refer to a few of the later ones: *Howard Express Co. v. Wile*, 14 P. F. S., 201; *Hoag v. The Railroad Co.*, 4 Norris, 293; *Pennsylvania Railroad Co. v. Fries*, 6 Id., 234, and *Mansfield Coal and Coke Co. v. McEnery et al.*, 10 PITTSBURGH LEGAL JOURNAL, 69.

I have looked in vain through this record for any evidence of negligence on the part of the defendant company. There is not even a scintilla. The deceased was at the time of the accident, and had been for years prior thereto, a brakeman in the employ of the company. On the night of the injury, which unfortunately resulted in his death, he was engaged in coupling and uncoupling the cars of a freight train. While so engaged, in some manner unexplained to the jury, he fell under the wheels of the tank or tender of the locomotive, which passed over one of his legs, producing the injury complained of. As to how he fell, or the cause of his falling, there is not a word of evidence. The theory of the plaintiffs was that his fall was occasioned either by reason of the roughness or inequalities of the track, or in an attempt to get on the tank; the allegation being that the step was defective and that he missed his footing because of such defect. It appears from the evidence that the track at the particular point where the accident occurred was in the course of being repaired; that it had been raised a few inches, and the space between the ties had not been ballasted or filled in; that as regards the step, it was not defective in its construction, but as plaintiffs alleged, was not in the position it should have been to insure the greatest amount of safety. Yet even as to this point, the plaintiff's own evidence was entirely balanced, while it was not denied that the deceased had used the step for a year without complaint to the company, and that if he had made objection to it, the rule or practice of the company required it to be changed to suit the crew operating the engine, of which the deceased was one.

Had there been evidence to show that the deceased came to his death by reason of the condition of the track, or of the step, it would, notwithstanding, have been too weak and inconclusive to establish negligence on the part

of the defendant company and to base a verdict for damages upon. There certainly was no duty to ballast the track for the safety of its employees, and, except perhaps at a crossing, no such duty to the public. Besides, the inequalities were occasioned by necessary repairs to the track, of which repairs the deceased as an employee of the company must be presumed to have had knowledge.

There was not, however, as before stated, a particle of proof that either the track or the step had anything to do with his death. For aught that appeared he may have fallen in a fit, or for some cause wholly disconnected with either. The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or at most mere possibilities. This will not do. The practical effect of the judgment below is to take the property of the defendant and give it to the plaintiffs. This is not allowable, even in the case of a corporation.

Judgment reversed.

Court of Common Pleas, Greene County.

CAROLINE HOOK et al. v. JESSE HOOK.

An action of ejectment was brought in August Term, 1848; in September, 1849, the case was at issue; on November 18, 1853, a rule to take depositions was granted. The case then rested until October, 1879, when the present rule to substitute Lazear as defendant was taken.

Held, that the plaintiff by his laches and the length of time elapsed should be presumed to have abandoned his suit, and the substitution was refused.

The record in a case like this would not be notice, for Lazear might fairly have concluded from an inspection of the record that plaintiff had abandoned his action.

Sur rule to show cause, etc.

Opinion by WILSON, P. J. Filed May 5, 1881.

This suit was brought to August Term, 1848. On the 9th of February, 1849, an award of arbitrators was filed, finding "no cause of action." On 27th of February, 1849, an appeal was taken by plaintiffs. In September, 1849, the case was put at issue, and the case was put on the trial list at different courts up to October 6, 1853. On 18th of November, 1853, the plaintiffs entered a rule to take depositions, and the rule issued. After this nothing appears, from the docket, to have been done until the 12th of June, 1867, when the plaintiffs entered a rule on defendant to file an "abstract of title," etc. This rule was issued, but not served. There the case rested until October 13, 1879, when a rule to show

cause why Thomas C. Lazear should not be substituted as party next in interest (the defendant being dead) was granted by the court. To this rule T. C. Lazear filed an answer, setting up, in substance, *first*, that he is not the person next in interest under the Act of 13th of April, 1807; and, *second*, that further proceedings in the case ought to be stayed, owing to the great lapse of time since the bringing of the suit and the taking of the present rule; in other words, that the plaintiffs, by failing to move since November, 1853, are presumed to have abandoned their suit.

As to the first position taken by the respondent: It appears, from the answer of T. C. Lazear, that he purchased the land in dispute in 1877, at a sale made by an order of the Court of Common Pleas of Greene county, Pa., granted to the assignees for the benefit of creditors, to whom the defendant, Jesse Hook, had assigned said land in 1875.

From the testimony of J. B. Hook it appears that Jesse Hook died in November, 1878.

We are not aware of any case in which it has been determined what is meant by the phrase "next in interest," as used in the Act of 1807. It is true there are several reported cases involving the substitution of persons as parties to actions, but in neither of them is there a construction given to the words we have quoted, each case seeming to depend on its peculiar facts.

Under the facts in this case, we are of the opinion that Mr. Lazear is the "person next in interest," and that he may be compelled to become the party defendant at the instance of the plaintiffs, unless the plaintiffs have lost their day in court by their delay and negligence. The assignees were but the agents of Jesse Hook to convert his property into money, and apply the money to the payment of his debts. So that, in purchasing from the assignees, Mr. Lazear, in effect, bought from Jesse Hook. The fact that the court granted an order to sell the lands of Jesse Hook, divested of liens, does not alter Mr. Lazear's position; he still remains the person following Jesse Hook in the possession of the land in suit under a title derived from Jesse Hook.

The second position taken by the respondent amounts to a motion to stay further proceedings in the case. In *Morford v. Cook*, 12 H., 92, Judge BLACK intimates that a defendant might "take advantage of a plaintiff's long delay, and make a demand upon the court to strike the case off as abandoned." And in *Hemphill v. McClimans*, 12 H., 367, it is said by the same judge that "a very long delay, after the issuing of a

summons, may sometimes be taken as evidence that the cause has been abandoned; and in an abandoned cause, if a defendant would refuse to plead, the court might refuse to compel him. But he gives up that advantage when he goes to issue and to trial." From these cases we may well infer that when the plaintiff suffers a long time to elapse without doing anything towards the prosecution of his suit, the defendant may move the court to strike off the case as abandoned, or may claim the protection of the court when he refuses to plead. Mr. Lazear, not yet being a party in court, cannot move to strike off this case; but, as it is sought to bring him in, he may claim the benefit of the principle laid down in the cases referred to, and ask the court to refrain from compelling him to become the party defendant, on the ground that the plaintiffs are seeking to revive a suit that had been abandoned. In *Huffman v. Stiger*, 1 Pitts. Reports, 185, the plaintiff died shortly after bringing suit, and some twenty-six years afterwards his heirs asked to be substituted as parties plaintiff, but the court refused to allow them to become parties to the action, basing their decision on a rule of court. The case went to the Supreme Court, and it was there held that the court below acted correctly, independent of the rule of court; that, owing to the great delay in making the application to become parties to the suit, it ought to be presumed that the heirs had abandoned the cause. We are of the opinion, therefore, that Mr. Lazear has a right to request the court to refuse to make him a party in this suit on account of the great delay on the part of the plaintiffs in prosecuting their action; and that his request ought to be granted if the facts warrant the court in treating the case as having been abandoned by the plaintiffs.

In the former argument of this matter, the opinion of the court was filed, in which we said, "the only objection that seems to be made by T. C. Lazear, Esq., to the rule on him to show cause why he should not be substituted as party defendant is that owing to the lapse of time since said suit was brought the plaintiffs are presumed to have abandoned their action. This objection would be well taken if nothing had been done in the cause since 18th of November, 1853, when plaintiffs took a rule to take depositions. But it appears from the record that, on the 1st of May, 1867, the plaintiffs had a rule issued on the defendant to file an abstract of title, etc., which rule was served on R. W. Downey, Esq., attorney for defendant, on 4th of May, 1867. We think this act of the plaintiffs was sufficient to let the defendant know that the action had not been abandoned." After that

opinion was filed, it was discovered that the plaintiffs' attorney (no doubt by mistake) had handed to the court a rule to file an abstract of title, etc., in another case, in which Jesse Hook was the defendant, and that the court had been misled in finding that the rule entered in this case had been served on defendant's attorney. Upon being informed of this mistake, we granted Mr. Lazear a rehearing on the rule to show cause, etc. As the record is now presented to the court, we regard the entertaining of the rule in 1867 as a futile act on the part of the plaintiffs; for, not being served on the defendant or his attorney, it did not "let the defendant know that the action had not been abandoned." Throwing out of consideration, therefore, the rule issued in 1867, we have the plaintiffs remaining quiet for a period of nearly twenty-six years, from November, 1853, to October, 1879. No explanation has been made or excuse offered for this long delay, either by the plaintiffs or by their attorney, who was their guardian, and who brought the suit. It seems strange that, after waiting so long, the plaintiffs should now, that the defendant is dead, become so desirous of having their case put in proper shape for trial. From the time the suit was begun, down to the year 1875, the defendant remained in the possession of the premises in dispute, just as he had done for the preceding twenty years. The trial before arbitrators had resulted favorably to him; the plaintiffs had arrived at an age when they could act for themselves, and had moved to the West, paying no attention to their suit, and leaving no one behind them who thought it worth while to look after their interests as involved in the controversy with Jesse Hook.

As the matter is now presented to the court, the only satisfactory conclusion at which we can arrive as to the conduct of the plaintiffs is that they had abandoned their cause, and did not intend to prosecute it any further; and if Jesse Hook was alive and now in court, demanding to have the case stricken off as abandoned, his demand would be granted. Holding, then, as we do, that it would be our duty to stay further proceedings in the case at the instance of a party in court, we think there is a still stronger obligation on us to interpose, when we find the plaintiffs are trying, after this long delay, to bring a stranger into court in order that they may carry on a "stale" suit. Mr. Lazear bought the property in dispute at a public sale, at which no notice of the claim of the plaintiffs was given, and he paid therefor a valuable consideration. But it may be said that, as he purchased *pendente lite*, he is chargeable with con-

structive notice of the claim of the plaintiffs, and that he made his purchase subject to the result of the suit. Such is the rule, we admit, but, under the circumstances of this case, the rule must be applied subject to the same qualifications that it would be in a proceeding in equity, namely: "that it is essential to the operation of a *lis pendens* as notice that it should be diligently prosecuted; and a complainant who suffers the proceeding to lie dormant for an unreasonable length of time will not be aided by the chancellor against a purchaser whom he has contributed to mislead by his laches. See Leading Cases in Equity, vol. 2, p. 198. Even if Mr. Lazear had searched the dockets to see if there was any pending action of ejectment against Jesse Hook, he might have very fairly and justly concluded from what he saw in the record of this case, that the plaintiffs had long since given up and abandoned this action.

Being of the opinion that the plaintiffs ought not to be aided in their effort to renew their contest after such a very long delay, the rule to show cause why T. C. Lazear, Esq., should not be substituted as party defendant must be discharged.

And now, May 5, 1881, it is ordered and directed that the order of court, made October 4, 1880, making absolute the rule to show cause why T. C. Lazear should not be substituted as party defendant, be, and the same is hereby revoked and set aside, and it is now ordered and directed that said rule be discharged.

AN ACT RELATING TO APPEALS, Etc.

The following act relating to appeals and writs of *certiorari* and of error was passed at the last session of the Legislature and approved by the Governor: "That no appeal shall hereafter be entered from the judgment, order or decree of any subordinate court in this Commonwealth, nor shall any writ of *certiorari* or of error to such court be delivered until the party or parties entering such appeal or purchasing such writ shall have first entered into a recognizance with sufficient sureties in *double the amount of costs accrued* conditioned upon the affirmance by the Supreme Court of such judgment, order or decree for the payment of all costs that have accrued in the cause or shall accrue upon the said appeal or writ of error or *certiorari*, and for the return to the court below of the record with remittitur; *Provided*, That this section shall not be construed to change the existing laws as to the nature of the recognizance required to effect a supersedeas."

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PITTSBURGH, PA., SEPTEMBER 28, 1881.

In Memoriam.

Action of the Allegheny County Bar on the Death of President James A. Garfield.

The bar of this county paid their tribute to the memory of our lamented President in a very fitting and impressive manner. Immediately after the assembling of the courts on the 21st inst. the sad event was announced and thereupon an adjournment until the following morning, was ordered. On Wednesday morning the judges met in Court of Common Pleas, No. 2, to enable the bar to take such suitable action as the solemn occasion demanded. After discussion it was ordered that all of the courts stand adjourned until Tuesday, the 27th inst., and that a general bar meeting be held on Friday, the 23d inst., at 2 o'clock, P. M. A committee consisting of the following named gentlemen was then appointed to attend to the details of the same, viz: Messrs. Jacob F. Slagle, Geo. Shiras, Jr., John Dalzell, W. D. Moore, Chris. Magee, J. H. Miller, D. D. Bruce and John Barton.

In addition to the foregoing proceedings, a meeting was subsequently held in the Court of Quarter Sessions, Hon. J. M. KIRKPATRICK presiding. The following gentlemen were appointed a committee to prepare resolutions: Hon. Thomas M. Marshall, Marshall Swartzwelder, R. M. Gibson, W. D. Moore, General William Blakely, John S. Robb, T. H. Davis, E. A. Montooth and Clarence Burleigh. While the committee were absent the following named gentlemen made brief remarks: Maj. A. M. Brown, John H. Kerr, Christopher Magee, D. D. Bruce, W. D. Porter, Hon. William A. Stone and Geo. R. Cochran. The committee, through Mr. Moore, presented the following, which was adopted and ordered to be spread on the minutes of the court:

"In a time of profound peace and general prosperity, when by his wise and just administration of the Government, JAMES A. GARFIELD had won for himself the love and confidence of his own people and of the whole world; without cause, without provocation, when there was no ill to be deplored, and no wrong to be re-

dressed, God in his inscrutable Providence suffered him to fall a victim to the frenzy of an assassin. After months of suffering and of alternate hope and fear on the part of the whole people, and after its endurance by him with a patience, courage and hopefulness which compelled the admiration and homage of the world, he died.

"In his death we deplore the loss of a wise and just ruler, a pure and faithful husband, a brave and generous soldier who illustrated on many battle fields his love for the country, among whose martyrs his name is now recorded; his fame and memory are part of the country's history, and no small part of its glory.

"To all who loved and honored him, his death must bring a sorrow which words cannot express, and to them this consolation remains forever, that through a comparatively brief yet illustrious career he exemplified every virtue which could give grace to private life and dignity, and honor to public employment. From the sanctity of a singularly sweet and gracious home; from the conflicts of politics and worldly ambition; from the storm of battle and the perils and temptations of the most exalted office in the world, God has called him to the rest which has been prepared for His beloved.

"Whilst we mourn our own bereavement we take comfort in the remembrance that he crowned his large manhood with an humble, Christian faith, and died as he had lived, in hope of a glorious immortality.

"If he could have spoken in those last hours he would no doubt have said in the presence of the judgment seat as his stricken and sorrowing mother said, and as we humbly say, 'God knows best; I will not murmur.'"

The general meeting was held in accordance with the call, and was called to order by Jacob F. Slagle, Esq. His Honor Judge EWING was elected to the chair and made some touching and appropriate remarks. The organization was completed by the election of the following officers, viz:

Vice-Presidents—Hons. E. H. Stowe, J. M. Kirkpatrick, F. H. Collier, J. W. F. White, J. H. Bailey, Wm. G. Hawkins, Jr., J. W. Over, J. P. Sterrett, Wilson McCandless, Wm. McKenna, M. W. Acheson.

Secretaries—Messrs. W. C. Moreland, J. H. Baldwin, J. K. P. Duff, T. H. Davis, C. F. McKenna, A. Tausig.

W. D. Moore, Esq., presented the report of the committee on arrangements, which recommended that the resolutions as adopted by the Court of Quarter Sessions be readopted, and that the same be spread upon the minutes of all

of the courts. The resolutions were then read, and after the motion to adopt the same as recommended was seconded, the following named gentlemen, responding to the call of the chair, addressed the meeting with much feeling and effect, viz: Messrs. R. B. Carnahan, E. A. Montooth, T. M. Marshall, R. M. Gibson, W. S. Pier, A. M. Brown, P. H. Winston and John Dalzell.

The motion was then carried and the meeting adjourned. The bench and bar were fully represented and the most profound sorrow was manifested by all those present. The court room was heavily and tastefully draped with flags andrape.

Supreme Court, Penn'a.

COMMONWEALTH v. A. McHALE.
SAME v. JAMES T. KELLY.
SAME v. JOHN J. KELLY.

Fraud committed at an election is a crime at common law, and persons may be indicted therefor.

The indictments charging frauds committed at the election of the District Attorney in Schuylkill county in this case are good at common law; they do not come under the Act of 1839 in reference to election frauds, and therefore the limitation of one year as to when indictments may be found does not apply.

Error to the Court of Quarter Sessions of Schuylkill county.

Opinion by PAXSON, J. Filed May 2, 1881.

The court below quashed the indictment in each of the above cases, upon the ground that the offenses charged were barred by the statute of limitations. If, as was assumed by the learned judge, the indictments are under the Act of July 2, 1839, and its supplements, and the limitation in said Act is not enlarged by the 77th section of the Criminal Procedure Act of 31st of March, 1860, his conclusion is not inaccurate. A careful comparison of the several indictments with the Act of 1839 and its supplements, leads us to the conclusion that they are not laid under it, and hence do not come within its limitation. One of them, *Commonwealth v. John J. Kelly*, No. 300 January Term, 1880, may have been intended to come within the provisions of section 106 of said Act; but the indictment does not charge the precise offense defined in said section, although it does one of a similar nature. Nor are we able to find any other Act of Assembly which will sustain these indictments. If, however, the acts charged are offenses at common law, they would not come within the limitation claimed for the Act of 1839. The 178th section of the Crimes Act of 31st of March, 1860, P. L., 425, provides that

"every felony, misdemeanor or offense whatever, not specially provided for in this act, may and shall be punished as heretofore." This is a saving section, leaving every crime not specially provided in this act punishable as heretofore: Report on Penal Code, 37. Under it an indictment will lie against a woman as a common scold: *Commonwealth v. Mohr*, 2 P. F. S., 243.

The indictment against Anthony McHale contains three counts. In the first count it is charged, that "intending to procure a false count and return of the votes cast by the electors," etc., he did "make false and fraudulent entries in the books kept by the clerks at said election, in said election district, which books are commonly known as the lists of voters of the names of divers persons, to wit: twenty-one persons, whose names are as follows," etc. The second count charges, that with like intent he did "deposit among the ballots cast at said election, in said election district, by the electors voting thereat, false and fraudulent ballots of a large number, to wit: twenty-one ballots," etc. The third count charges that with like intent he did, "with the connivance of the election officers holding said election, undertake and assume to count the ballots cast by the electors voting at said election, in said election district, and did falsely, fraudulently, maliciously and unlawfully make a false and fraudulent count of said ballots, as to make it appear that two hundred and eleven votes were deposited for one Adolph W. Schalek for the office of District Attorney, when in truth and in fact he did not receive more than one hundred and eighty-five votes," etc.

The indictment against James T. Kelly charges, that with a similar intent to procure a false count, he did "deposit among the ballots cast at said election, in said election district, by the electors voting thereat, false and fraudulent ballots of a large number, to wit: twenty-one ballots."

The indictment against John J. Kelly charges substantially the same offense as is set out in the first count of the indictment against McHale.

Some of these offenses, perhaps all of them, are indictable under the Act of 1839, and its supplements, when committed by election officers. The defendants were not election officers; at least they were not indicted as such.

It must be conceded that offenses which strike at the purity and fairness of elections are of a grave character. Are they indictable at the common law? This is a serious, and, at the same time, comparatively new question. In considering it we have little in the way of authorities to guide us.

It was assumed by the learned counsel for the defendants that an indictment will not lie at common law for such acts. In their printed argument they dismiss the subject with this brief remark: "Offenses against the election laws are unknown to the common law; they are purely and exclusively of statutory origin." It may safely be admitted that if the question depends upon the fact whether a precise definition of this offense can be found in the text books, or perhaps in the adjudged English cases, the law is with the defendants. This, however, would be a narrow view, and we must look beyond the cases and examine the principles upon which common law offenses rest. It is not so much a question whether such offenses have been so punished as whether they might have been.

What is a common law offense?

The highest authority upon this point is Blackstone. In chapter 13 of vol. 4, of Sharswood's edition, it is thus defined: "The last species of offenses which especially affect the Commonwealth are those against the public police or economy. By the public police or economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it *comprises all such crimes as especially affect public society* and are not comprehended under any of the four preceding series. These amount, some of them to felony and others to misdemeanors only." The learned author then proceeds to define certain offenses of both classes, which are among the crimes against the public police or economy. The felonies I will omit. The misdemeanors are: (1) Common or public nuisances, of which a large variety are given, commencing with obstructions to public highways and ending with common scolds. (3) Sumptuary laws. (4) Gaming. (5) Destroying game. These, as the text shows, are but illustrations. A large number of these and other common law offenses are now, and have for many years been regulated by statute in England. But in most instances the statute is merely declaratory of the common law; the object being to define the crimes with greater accuracy or to increase the punishment.

The above quotation from Blackstone is in harmony with other approved text writers. Bishop, in his work on Criminal Law, vol. 1,

Sections 911 and 922, says: "The government requires its subjects to do more than simply abstain from attempting its overthrow. It requires them to give, when called upon, their active assistance to it, and at all times to refrain from casting obstructions in the way of its several departments and functions. Therefore, every violation of these duties being sufficient in magnitude for the law to regard as criminal. * * * We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore, any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law." Mr. Wharton, in his work on Criminal Law, vol. 1, Section 6, places the giving of more than one vote at an election as among the misdemeanors at common law. The Supreme Judicial Court of Massachusetts, in two cases, has recognized the same doctrine. The first was *Commonwealth v. Silsby*, 9 Mass., 417, which was an indictment charging that the defendant did "wilfully, fraudulently, knowingly and designedly give in more than one vote for the choice of selectmen of the said town of Salem at one time of balloting." After conviction the defendant moved in arrest of judgment that there was no statute covering the offense. It was said by the court: "There cannot be a doubt that the offense described in the indictment is a misdemeanor at common law. It is a general principle, that where a statute gives a privilege, and one wilfully violates such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of other voters, and for this offense the common law gives the indictment. The other case is *Commonwealth v. Hoxey*, 16 Mass., 385. The defendant was charged with disturbing a town meeting, assembled to make choice of town officers for the political year then ensuing, and that the said defendant, "intending as much as in him lay to prevent the choice of said selectmen, according to the will of the electors, and to interrupt the freedom of election, unlawfully and disorderly did openly declare that the old selectmen should not be chosen, and attempted repeatedly to take from the box, which contained the ballots of the electors, the votes of the electors," etc. The defendant pleaded guilty to the indictment and moved in arrest of judg-

ment, "because the said indictment purports to be grounded upon a statute law of the Commonwealth; whereas, there is no such statute in the State making the facts set forth in the indictment an offense against the Commonwealth, and because the facts set forth in the indictment do not amount to an offense at common law." The court, after admitting there was no statute to meet the case, proceeds to say: "The remaining question is, do the facts charged amount to an offense at common law? On this question we entertain no doubts. Here was a violent and rude disturbance of the citizens lawfully assembled in town meeting, and in the actual exercise of their municipal rights and duties. The tendency of the defendant's conduct was to a breach of the peace, and the prevention of elections necessary to the orderly government of the town and due management of its concerns for the year. It is true that the common law knows nothing perfectly agreeing with our municipal assemblies; but other meetings are well known and held in England, the disturbance of which is punishable at common law as a misdemeanor. In this Commonwealth town meetings are recognized in our Constitution and laws, and the elections made and business transacted at these meetings lie at the foundation of our whole civil policy. If, then, there were no statute prohibiting disorderly conduct at such meetings, an indictment for such conduct might be supported." While the court put this case partly upon the ground that the defendant's conduct tended to a breach of the peace, it is evident the principal reason was the interference with the rights of the electors, which, as the learned judge truly said, "lie at the foundation of our whole civil policy," and it may be safely assumed that every fraud upon the ballot tends directly to a breach of the public peace, if not to revolution and civil war.

We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they affect the public police or economy.

It needs no argument to show that the acts charged in these indictments are of this character. They are not only offenses which affect public society, but they affect it in the gravest manner. An offense against the freedom and purity of the elections is a crime against the nation. It strikes at the foundation of republican institutions. Its tendency is to prevent the expression of the will of the people in the choice of rulers, and to weaken the public confidence in elections. When this confidence is once destroyed the end of popular government

is not distant. Surely if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, the offense which involves the rights of a free people to choose their own rulers in the manner pointed out by law is not beneath the dignity of the common law, nor beyond its power to punish. The one is an annoyance to a small portion of the body politic, the other shakes the social fabric to its foundations.

We are of opinion that the offenses charged in these indictments are crimes at common law. We regard the principle thus announced as not only sound but salutary. The ingenuity of politicians is such that offenses against the purity of elections are constantly liable to occur which are not specifically covered by statute. It would be a reproach to the law were it powerless to punish them.

It follows, from what has been said, that it was error to quash the indictments.

The judgment is reversed in each case and a procedendo awarded.

For plaintiff in error, *Guy E. Farquhar*, Special District Attorney, *C. W. Wells, Esq.*, and *Hon. John F. W. Hughes*.

Contra, Messrs. Lin Bartholomew, John A. Nash, James B. Reilley and John W. Ryon.

◆◆◆
COMMONWEALTH v. McHALE et al.
SAME v. A. McHALE and others unknown.

An indictment for conspiracy charging the commission of frauds at an election is a common law offense, and the limitation of one year in the Act of 1839, therefore, does not apply.

The court, under the Act of March 12, 1866, may appoint a special District Attorney to try cases, and his signature to an indictment is proper and legal.

Error to the Court of Quarter Sessions of Schuylkill county.

Opinion by PAXSON, J. Filed May 20, 1881.

The single assignment of error in each of the above cases is that the court below quashed the bill of indictment. As the cases are substantially identical, they may be considered together.

The indictments were quashed upon the ground that the offenses charged therein were barred by the statute of limitations. They were found by the grand jury on November 3, 1879. The time laid as the commission of the offense was November 5, 1877. This lacks two days of the limitation of two years prescribed for the prosecution of misdemeanors by the 77th section of the Criminal Procedure Act of 1860. The court below held, however, that the latter act did not apply, for the reason that the prosecutions were under the Act of 2d of July, 1839, P. L., 519, entitled "An Act relating to the elec-

tions of this Commonwealth," the 28th section of which provides that all prosecutions under said act shall be instituted "within one year next after the cause thereof shall have accrued unless otherwise herein provided." We need not discuss the question whether the limitation contained in this section is repealed by the subsequent Act of 1860, before referred to. We decide the case upon other grounds.

The Act of 1839, with its various supplements, constitutes the election code of this State. It defines a large number of offenses connected with the holding of elections. The greater portion of them are offenses by election officers, though illegal voting and certain acts of unlawful interference with elections and election officers are also prescribed and punished.

The case of the defendants, however, does not come within the Act of 1839, and consequently not within its limitation. The indictments charge them with a conspiracy to do the things, or at least some of the things, prohibited by said act. The object of the conspiracy, as set forth in the first count of the indictment, was "to procure a false, fraudulent and untrue count and return of the votes so cast by the said electors," etc. The count then sets forth divers overt acts, some of which, if committed by the parties, would render them amenable to the penalties of the Act of 1839. The second and third counts charge a conspiracy of a like object and similar character, followed by other overt acts committed in furtherance of said conspiracy. The fourth and fifth counts set out the conspiracy, but omit the overt acts, being what is known in criminal pleading as the common counts.

It was urged that, inasmuch as the particular offenses averred as constituting the overt acts were barred by the statute when the indictments were found, the court below was right in quashing the bills. This does not follow. The error into which the learned judge fell was in losing sight of the precise nature of the offenses charged, and in supposing the indictment was under the Act of 1839. The indictments were for a conspiracy—a common law offense, and and with which the Act of 1839 has nothing whatever to do. The gist of this offense is the combination—the unlawful agreement to do the particular thing, and the offense is complete, as all the authorities agree, the moment the combination is formed. The overt acts are no part of the crime charged; they are merely the evidence of it, the means by which the Commonwealth is enabled to prove the conspiracy itself. The object of setting them forth in the indictment is to furnish notice to the defendants of the particular acts the Commonwealth relies

upon as evidence of their having acted in concert. In this respect they supply the place of a bill of particulars. The fact of the combination is almost always inferred by the jury from the acts. The overt acts of the parties as direct evidence in the shape of declarations can seldom be shown. When established, a conspiracy has always been regarded as a serious offense. It is the combination that makes it so. There are many things that one man may do that two or more may not combine to do. In the recent case of *Commonwealth v. Bartleson*, 4 Norris, 487, we had occasion to review this branch of the law of conspiracy with some care, and need not repeat what was there said.

The fourth and fifth counts, as before stated, set forth no overt act, and there is nothing to connect them, even by implication, with the Act of 1839.

It is manifest from what has been said that, as the indictments charge a common law conspiracy, they are within the limitation of the Act of 1860, and are not barred until after two years.

It was urged, however, that the indictments were properly quashed because not signed by the District Attorney. They were signed by Guy E. Farquhar, Esq., who was specially appointed by the court to try these cases, under the Act of 12th of March, 1866, P. L., 85. The appointment appears to have been regularly made in accordance with the provisions of the said act, and was eminently proper, as the District Attorney was a candidate at the general election at which the alleged frauds were committed, and which frauds it is stated increased his vote. It would, therefore, have been a breach of professional and official property for him to have acted as District Attorney in these cases. But it was said the appointment was illegal because the Constitution, adopted since the Act of 1866 was passed, makes the District Attorney a constitutional officer, and as such he cannot be stripped of his powers by the Legislature. There is little force in this suggestion. While the Legislature may not abolish the office it can control the officer. They can regulate the performance of his duties and punish him for misconduct, as in the case of other officers, and when he neglects or refuses to act, or when, from the circumstances of a given case, it is improper and indelicate for him to act, it is competent for the Legislature to afford a remedy. This is all that the Act of 1866 does, and we think its provisions are not obnoxious to any constitutional provision.

The order quashing the indictments is reversed in each case and a procedendo awarded.

APPEAL OF ANNA J. CROSS et al.

Where trust moneys were used by a trustee, not in the acquisition of the title to real estate, but in its improvement, the proceeds of the sale of such real estate by the assignee for the benefit of creditors of the trustee, is not impressed with a resulting trust for the trust moneys so used.

Nor do the beneficiaries have a lien on the land, arising from the equitable circumstances of the case. Such a lien is unknown to Pennsylvania jurisprudence.

A resulting trust in lands must arise, if at all, at the inception of the title.

Appeal from the decree of the Court of Common Pleas of Chester county, confirming the report of John H. Brinton, Esq., auditor to distribute the balance appearing by the account of Job Keech, assignee in trust for the benefit of the creditors of John Y. Woodward.

By the report of the auditor, it appeared that the assignor purchased a farm in East Fallowfield township, a part of the proceeds of which were being distributed in 1847, and small lots subsequently. That in 1865 he was appointed guardian of Anna J. Cross and Mary E. McCreary, the appellants, and received, as such guardian, semi-annually, a pension due each of them as children of a deceased soldier, the last item of which was received October 17, 1876. The auditor further found: "The guardian applied these trust funds to his own personal uses. With them he improved his land, and built a common country house and some shedding * * These two balances make the sum of \$1,257.49, pension and bounty money of the minors; and their guardian used it in improving his land and in building a house and shedding as above stated. And the guardian thought such use of the trust money was safer than investing it in stocks."

The assignment in trust for creditors was made November 14, 1879, and the assignee, in his account, claimed credit for all liens entered before the receipt and use of these trust moneys. The balance was claimed by the wards, and also by John Y. Woodward, Jr., and Mary A. Taylor, children of the assignor, under two judgments entered January 28, 1879.

The auditor refused the claims of the appellants, and distributed the balance *pro rata* between the two judgments last mentioned.

The appellants filed exceptions to the report of the auditor, which were dismissed and the report confirmed by the court, FUTHEY, P. J., delivering the following opinion:

"John Y. Woodward was the owner of a tract of land, made up of parcels, which he had purchased at different times, and for which he had paid with his own funds.

"As guardian of two children, he received

moneys belonging to them, and, as the auditor finds, applied these trust funds to his own personal uses, in improving his land and building a common country house and some shedding thereon, thinking, as he said, that such use of the trust funds was safer than investing them in stocks. No portion of them was used in the purchase of the land.

"He became embarrassed and made an assignment for the benefit of creditors. The assignee sold the real estate by order of court, and settled his account, and an auditor was appointed to report distribution of the proceeds. The case is now before the court on exceptions to the report of the auditor.

"The contest is between the children, one of whom is now of age, and the other represented by another guardian, and judgment creditors, whose judgments were entered subsequently to the use of the trust moneys, and it is claimed on behalf of the children that they are entitled to take, from the fund for distribution in the hands of the assignee, the amount of their moneys made use of by the guardian, in preference to the judgment creditors.

"The principle is well settled that whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the *cestui que trust*, or as the product of it, equity will follow it. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such. And this result arises by operation of law, upon the presumed intention of the trustee, and is a trust itself which the courts will enforce. This is a principle so well settled that a citation of authorities is scarcely necessary: *Thompson's Appeal*, 10 H., 16; *Farmers & Mechanics' Bank v. King*, 7 P. F. S., 202; *Sadler's Appeal*, 6 Nor., 154; *Wallace v. Duffield*, 2 S. & R., 521.

"If the real estate of Woodward had been purchased with these trust moneys, this principle would have applied with force. But is it applicable under the facts of the case? The real estate was not thus purchased, and indisputably belonged to the guardian in his individual right. He simply made use of the moneys of his wards in the manner above indicated. In the cases where real estate has been impressed with a trust arising from the use of trust funds, there has been fraud in obtaining the title, or payment of the purchase money with the trust funds when the title was acquired. In such

cases a resulting trust is raised, and the purchaser is made a trustee: *Barnett v. Dougherty*, 8 Casey, 371; *Kellum v. Smith*, 9 Casey, 158; *Bickel's Appeal*, 5 Norris, 204; *Bispham's Eq.*, sec. 86; 1 Perry on Tr., sec. 133.

"No trust arose when Woodward became the owner of the real estate. The use of the trust moneys afterwards, in the manner indicated, did not impress the lands with a trust, or give the *cestui que trusts* an interest therein which can be followed.

"The identity of the trust funds is lost. They cannot be traced. They were used in paying debts contracted for improvements which are so united with the lands as to be incapable of ascertainment, in the sense contemplated by the law. It is impossible for a chancellor to say that the purchase money of the real estate, or any particular part of it, is the product of the trust moneys made use of by him

"Neither did the *cestui que trusts* acquire any charge on the land by reason of the use made of their moneys. It could at most be but an equitable lien, and such liens have not been engrafted on our jurisprudence: *Hepburn v. Snyder*, 3 Barr, 72.

"It is not necessary to consider the exceptions to the allowance to the assignor of his claim under the reservation in his assignment, as, under the view taken by the court, the exceptors have no interest in that question."

A decree was entered in accordance with the foregoing opinion, for which decree this appeal was taken.

For appellants, *R. Jones Monaghan, Esq.*

Contra, Messrs. W. B. Waddell and A. P. Reid.

Opinion by GORDON, J. Filed May 2, 1881.

The money in court for distribution was raised from the sale of the real estate of John Y. Woodward, and which he had previously assigned for the benefit of his creditors. This fund was claimed by judgment creditors, to whom it was awarded by the court below; it was also claimed by the appellants, for whom Woodward had been appointed guardian some time in the year 1865. Their claim upon the fund arises in this manner: The account of Woodward, as guardian, was settled in the Orphans' Court on the 28th of June, 1880, and he was found to be indebted to the estate of the minors in the sum of \$1,269.19, which sum he was unable to pay. Furthermore, the auditor has found that Woodward used this money of his wards in the improvement of the real estate from which the fund for distribution was raised. The claim now put forward by the appellants is that, as

Woodward used these trust moneys belonging to them in the improvement of the land which produced the money in controversy, the land itself, and, hence, the fund raised from it, was and is impressed with that trust, and that it ought, in the first place, to be used in the liquidation of their claim. Clearly, if the premises thus stated be correct, the conclusion follows as of course; for it is too well settled for discussion, that the law will follow the trust fund through any number of transmutations if it can be recognized clearly in those transmutations. But the auditor, and the court below, thought that this money of the appellants was not so impressed upon the Woodward land. They certainly were not used in the purchase of those lands; hence, there was no resulting trust in favor of the appellants, for a resulting trust in lands must arise, if at all, at the inception of title, either through fraud in the acquisition of that title, or through the payment of the purchase money by which it is obtained: *Barnett v. Dougherty*, 8 C., 371. As neither of these things happened in this case, the claim of the appellants cannot be sustained on the ground of such a trust. As, therefore, the money of these minors was not used in the acquisition of the title, it cannot be pretended that they have any direct interest in the lands covered by it. Neither, then, as owners, legal or equitable, have they a standing to claim the fund in controversy, or any part of it. If, then, the appellants had no such interest in the lands as to give them a claim upon the fund in court, by what right do they seek to be preferred to judgment creditors?

There is no doubt but that their money went to improve the lands of Woodward, and hence may have given them a value they would not otherwise have had; but, as we have seen, that did not give them a right in the title by which those premises were held, and they cannot, on this ground, successfully claim the fund in controversy.

But, it is said, the money of these beneficiaries has been used to improve the property, and they ought, therefore, to have a lien upon it to the extent of the moneys so expended. But what kind of a lien? Not a statutory one; for the Act of 1832, which would have given them a lien, was not pursued. A lien arising from the equitable circumstances of the case? But such a lien is unknown to Pennsylvania jurisprudence; it has not as yet been engrafted upon our legal system, and, it is to be hoped, never will be: *Hepburn v. Snyder*, 3 Barr, 72. This is, no doubt, a hard case, but if we were to establish the doctrine of equitable liens for the purpose of meeting this hard case, it would be like the let-

ting out of water; disaster and confusion would be the result. In vain would the unfortunate judgment creditor depend upon the dockets and records provided for his protection. Debts that he thought secure would be swept away by the insidious operation of secret equitable liens. With the utmost confidence might he bid in a tract of land to cover his judgment, only to find, in the end, that he had involved himself, and that perhaps hopelessly, for the benefit of some one else. Nor would a mortgagee be in a much better situation; for, though he is partially protected by the recording acts, yet he would always be exposed to the danger of having sprung upon him proof of notice of some hidden lien for which he was wholly unprepared; how easily such notice can be proved, since the Act of 1869, we all understand. We think, therefore, it is better for us to adhere to the old paths, with which we are well acquainted, rather than to try new ones which may lead us to unexpected disaster.

The judgment of the court below was right, and its opinion is so thoroughly logical and well considered, that we do not profess to have anything of value to add to it, except our approval.

Decree affirmed.

SHARSWOOD, C. J., dissents.

LEIDY v. PROCTOR.

The Act of 1836, providing a summary remedy for possession by a purchaser of real estate at sheriff's sale, was not intended for the benefit of the defendant, whose possession after the acknowledgment of the sheriff's deed it assumes to be unjust, but for the benefit of the purchaser.

The sheriff's vendee is not thereby deprived of any of his previous or concurrent remedies.

He may at once, after the acknowledgment and delivery of his deed, enter upon the premises, either to gather crops, plow the ground, cut down timber or do any other act of ownership, without becoming a trespasser, unless his acts are done with violence and the strong hand amounting to a breach of the peace.

Kellam v. Janson, 5 Har., 467; *Overdeer v. Lewis*, 1 W. & S., 90; *St Clair v. Shale*, 8 Har., 105; *Rogers v. Giltner*, 6 Cas., 185, approved and discussed.

Fallen timber, which a vendor of land or defendant in an execution, has not converted into saw-logs, rails or firewood before the date of the delivery of the deed, pass with the freehold as real estate.

Error to the Court of Common Pleas of Montgomery county.

Opinion by GORDON, J. Filed May 2, 1881.

By virtue of a certain writ or writs of *venditioni exponas*, issued out of the Court of Common Pleas of Montgomery county, at the suit of J. M. Albertson & Son, against William Leidy, the plaintiff in the present suit, the land of the said Leidy was sold by the sheriff to the defend-

dant, Joseph Proctor, a deed made therefor, which was duly acknowledged and delivered to him on the 10th of September, 1878. From this period he was the absolute owner of the land, and, though Leidy continued in the actual possession, that possession was wrongful; the right thereto was in Proctor. This very obvious legal proposition I do not understand to be disputed; but if Proctor had both the title and right of possession, why might he not lawfully enter? Or how does it come that in the exercise of a lawful right it is possible for him to be subjected to those pains and penalties to which one whose entry is without right ought alone to be exposed? Had Leidy's possession been by a tenant, immediately upon the delivery of the sheriff's deed, Proctor, by force of the statute, would have become the landlord of that tenant; and had Leidy, after that, entered upon the land he would have been a trespasser. Hence it was held, in the case of *St. Clair's Heirs v. Shale*, 8 Har., 105, that a sheriff's vendee might lawfully obtain possession of the premises by the attainment of the tenant of the defendant in the execution.

But if the law thus casts the immediate right of possession on the sheriff's vendee in the one case, why not in the other? Of course, to all this there is but one answer, and that is the one made use of by the plaintiff, that under the Act of 1836, the defendant is entitled to possession for the period of three months after the notice to quit. The learned judge of the court below thought this position was unsound, and we are of opinion he was right. The summary process given by the Act of 1836 was certainly not intended for the benefit of the defendant in the execution; the language of the act negatives such an idea, for, "in case of a finding for the petitioner, as aforesaid, the jury shall assess such damages as they shall think right, against such defendant or person in possession, for the *unjust detention* of the premises." Clearly the statute was not intended to favor one whose possession it assumes to be unjust—one who maintains such possession without right; it must, therefore, have been intended for the benefit of the purchaser at the sheriff's sale. Because he may not be able, by reason of the hostile attitude of the defendant or person in possession, to possess himself of the premises peaceably, and because the action of ejectment is tedious and expensive, therefore is this summary remedy under the Act of 1836 given. But the sheriff's vendee is not thereby deprived of any of his previous or concurrent remedies; he *may* serve notice and proceed under the act, but this is optional with himself. If he does not choose to

avail himself of this statutory process, he may resort to his common law remedies.

This very point was ruled in *Kellam v. Janson*, 5 Har., 467, where it was held that the vendee of land had no title at all as against a purchaser at sheriff's sale under a prior judgment against the vendor, because such title was wholly divested by the sheriff's sale. In the case cited, the court below assumed just what is here contended for on part of the plaintiff, that is to say, that the sheriff's vendee had no right to disturb the possession of the person claiming under the defendant in the execution, except by the process prescribed by the Act of 1836. That case, like the one in hand, was trespass brought by the vendee of the debtor against the purchaser at the sheriff's sale and the complaint was that this purchaser had entered during the temporary absence of the plaintiff, broken open his house and turned his goods out of doors. This was undoubtedly a strong case, nevertheless it was held, reversing the court below, that "an action is well founded only when a right is invaded; but that the plaintiff's right ceased by the entry of the defendant,—an act that completely obliterated the shadow of right cast by the plaintiff's possession. A complaint against the assumption of possession is a complaint against the assertion of a right, and a demand that the law shall give the plaintiff damages for the loss of that which it was wrong for him to have." It was further said that the case was governed by the principle governing *Overdeer v. Lewis*, 1 W. & S., 90, and of all those cases where redress is allowed by the act of the party; that the statutory remedies do not affect such right, since they are necessary only because such possession cannot always be assured by the mere act of the party. It is true that the case cited was one where the plaintiff had entered after the date of the sheriff's sale, and in this it is dissimilar to the case in hand, where the plaintiff merely continued a possession which had previously belonged to him. The principle, however, pervading the two cases is identical; in either case the plaintiff's right of action ceased with his right of possession, and that right had its end when the lawful owner made his entry. Moreover, if *Overdeer v. Lewis* is in point, as it is said to be, any shadow of doubt that might remain is swept away. In this case it was held, that a landlord might enter and remove from his premises a tenant holding over after the expiration of the lease, though he had not given notice as required by the Act of 1772.

These cases, then, settle this part of the present controversy, and support the ruling of the court below.

It is, however, the fifth assignment which the counsel for the plaintiff considers the most important, and he regards that part of the judge's charge covered by it as containing a startling legal heresy. "I charge you distinctly," says the court, "that all the timber that lay upon the ground before the sheriff's sale, and which had fallen, did not pass to the purchaser, Mr. Proctor, but was the personal property of Mr. Leidy. I do not think that this is material in this case, for the reason that there is no evidence here, not a scintilla, that Mr. Proctor ever carried away a single stick of this fallen wood. If others came and took it, they are liable for their trespasses. It is not his. Even if they did it under a sale from him, it would make no difference whatever in this case, for the conditions were that none of it was to be taken until the first of April next succeeding, and, besides, Mr. Leidy declares that in pursuance of instructions from Mr. Corson, he obtained a portion of that wood which was still lying there, even as against Mr. Proctor's tenant." But in this there is no error of which the plaintiff had any right to complain. The court assumed that Leidy had a right to the fallen timber, though he had done no act prior to the date of the sheriff's sale which indicated an intention to convert it into personal property. On this assumption it may be admitted that had the defendant by sale, or otherwise, authorized any person or persons to enter and take this fallen timber, before the bringing of this suit, he would have been liable as a trespasser, but he did nothing of the kind. He authorized no one to go upon the premises before the first of April, 1879, which was long after the bringing of this suit, so that if any timber was taken from that land it was not only without his authority but in express violation of the conditions of sale. We are, therefore, unable to see how, in all this, there was error of which the plaintiff could reasonably complain. Had the court gone farther than it did, and told the jury that the fallen timber, which the plaintiff had not converted into saw-logs, rails or firewood, before the date of the delivery of the sheriff's deed, passed with the freehold to the defendant, no more would have been said than the law warranted. In *Rogers v. Gilling*, 6 Casey, 185, where the action was trover for the fragments of a building which had been blown down by a tempest, before the date of the sheriff's sale, under which the defendants claimed, it was held that the plaintiff could not recover, that the fragments belonged to the sheriff's vendees.

In this case, Justice STRONG, who delivered the opinion of the court, made use of the follow-

ing language: "What, then, is the criterion by which we are to determine whether that which was once part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of re-annexation to the soil, and yet it remains realty. The true rule would rather seem to be, that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character."

As this opinion was very carefully considered, and as the authorities therein cited most fully sustain it, we must regard it as a definitive settlement of the question, adding only that, were the question a new one, our judgment would lead us to the same conclusion.

Judgment affirmed.

For plaintiff in error, *Geo. N. Corson, Esq.*
Contra, H. K. Weand, Esq.

NEW BOOKS.

THE AMERICAN DECISIONS, containing the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports, to the year 1869. Compiled and annotated by A. C. FREEMAN, Esq. Vols. XXV, XXVI, XXVII. San Francisco: A. L. BANCROFT & Co., Law Book Publishers, Booksellers and Stationers. 1881.

These volumes bring the cases re-reported partially down to the year 1835. Volume XXVI contains the following Pennsylvania cases: *Com'th v. Baldwin*, *Same v. Leaky* (to which there is a long and valuable note by the editor, Mr. Freeman), *Owens v. Dawson*, *Hoge v. Hoge*, *Methodist Church v. Remington*, *Stauffer v. Commissioners*, *Com'th v. McAllister*, *Jacobs v. Bull*, *Gordon v. Preston*, *Adams v. Betz*, *Coxe v. Blander*, *Thompson v. Lusk*, *Rung v. Shoneberger*, *Gilbert v. Hoffman*, *Hind v. Holdship*, *McFarland v. Stewart*, *Lehigh Bridge Co. v. Lehigh Coal and Navigation Co.*, *In re Yarneil's Will*, *Nisbet v. Patton*, *Oliver v. Oliver*, *Hutchinson v. Landt*, *Brown v. Com'th*, *Marsh v. Pier*, and *Girard v. Phila.*

Volume XXVII contains the following Pennsylvania cases: *Hickman v. Caldwell*, *Rhoads v. Gaul*, *Earnest v. Parke*, *Hale v. Henrie*, *Hemmich v. High*, *Stouffer v. Latshaw*, *Ramsey's Appeal*, *Kisler v. Kisler*, *Hoy v. Sterrett*, *Myers v. Hodges*, *Harrington v. McShane*, *Vicary v. Moore*, *Klingensmith v. Bean*, *Beltzhoover v. Blackstock*, *Lodge v. Patterson*, *McDowell v. Simpson*, *Colwell v. Woods*, *Clark v. Russel*, *Crest v. Jack*, *Comegys v. Carley*, *Ligget v. Smith*, *Blackstone v. Blackstone*, *Johnson v. Boyer*, and *Harper v. Blean*.

There are brief notes to several of the foregoing cases, giving reference to subsequent ones in which the doctrine of the principal case has been sustained, modified or reversed. From many of the notes ample briefs could be made. The cases re-reported from other States are annotated in the same manner. The print and binding are first-class in every respect, and Messrs. Bancroft & Co. deserve great credit for the enterprise and liberality shown in the publication of this unquestionably valuable series of reports.

A TREATISE ON EQUITY, as administered in the United States of America; adapted for all the States, and to the union of legal and equitable remedies under the reformed procedure. By JOHN NORTON POMEROY, LL. D. In three volumes. Vol. I. San Francisco: A. L. BANCROFT & Co. 1881.

In the preface to this work Dr. Pomeroy states that his design is "to furnish to the legal profession a treatise which should deal with the equity jurisdiction and jurisprudence as they now are throughout the United States; with their statutory modifications and limitations and under their different types and forms in various groups of States, and thus to prepare a work which would be useful to the bench and bar in all parts of the country." He has certainly selected a heavy task and it is to be feared that in covering so much ground the work may become too diffuse. The volume before us is divided into two parts, containing five chapters and also has an introductory one. The chapters are entitled, "The General Doctrine concerning the Jurisdiction;" "General Rules for the Government of the Jurisdiction;" "The Jurisdiction as held by the courts of the several States and by the courts of the U. S.;" "The Fundamental principles or maxims of Equity," and "Certain distinctive doctrines of Equity Jurisprudence." The chapters are divided into sections which are appropriately sub-headed. The text is well written, contains a great deal of good and clearly original matter, and the citations show that an immense amount of labor must have been expended in the preparation of the volume.

—The following appears in the advertising columns of the *Legal Intelligencer*: "It may be of interest to the profession throughout the State to learn that at the approaching session of the Supreme Court of Pennsylvania at Pittsburgh, petitions of members of the Bar of many of the counties constituting the Middle and Western Districts, will be presented, soliciting the court to fix the hearing of their causes at Philadelphia, instead of Harrisburg and Pittsburgh, as heretofore."

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PITTSBURGH, PA., OCTOBER 5, 1881.

Supreme Court, Penn'a.**FOSSELMAN v. ELDER.**

A testatrix, having made a will in due form, died suddenly in January, 1880. After her death, there was found among her papers a sealed envelope containing a promissory note for \$2,000, and also the following paper in the testatrix's handwriting: "Lewistown October 2, 1879. My wish is for you to draw this \$2,000 dollars for your own use should I die sudden. ELIZABETH FOSSELMAN." The envelope was indorsed in the testatrix's handwriting "Dear Bella, this is for you to open." It was in evidence that one Isabella Fosselman, a niece of testatrix, had lived with testatrix for many years:

Held, that the paper and indorsement on the envelope were together entitled to probate as a codicil to the will, and that Isabella Fosselman was entitled to the note thereby bequeathed to her by testatrix.

Error to the Court of Common Pleas of Mifflin county.

Amicable issue, framed to determine the ownership of a certain promissory note given by T. F. McCoy, president of the board of trustees of the Presbyterian church of Lewistown to Elizabeth Fosselman, for the sum of \$2,000, wherein Isabella Fosselman was plaintiff and G. W. Elder, executor of Elizabeth Fosselman, deceased, was defendant. The following is extracted from the opinion of the Supreme Court:

"The facts upon which the question of law in this case arose were either admitted or established by the verdict.

"In the second item of her will, dated July 18, 1878, the defendant's testatrix (Elizabeth Fosselman) made the following provision for the plaintiff, Isabella Fosselman, viz: 'I do will, devise and bequeath to Isabella Fosselman (who has lived with me many years), the house and lot wherein I now live, together with all the furniture and personal property that may be therein at the time of my decease; by furniture and personal property I mean everything I may have at my decease, except notes and bonds, and evidences of debt, and also one thousand dollars in cash, to be paid to her as soon as practicable after my decease, provided, nevertheless, the legacies herein bequeathed shall be forfeited if she claims any compensation for services rendered me from my estate.' The testatrix having died suddenly in January, 1880, the will

was duly probated a few days thereafter and letters testamentary issued to defendant (G. W. Elder) the executor therein named. While he and the appraisers were engaged in making the inventory, a sealed envelope was found among the valuable papers of the deceased, on which the following words addressed to the plaintiff were indorsed, viz: 'Dear Bella, this is for you to open.' The envelope was immediately handed to her, and being opened in the presence of the executor and appraisers, was found to contain a paper of which the following is a copy, viz: 'Lewistown October 2, 1879. My wish is for you to draw this \$2,000 dollars for your own use should I die sudden. ELIZABETH FOSSELMAN.'

"It also contained a note for \$2,000, made by the trustees of the Presbyterian church of Lewistown, dated October 2, 1879, and payable to the order of testatrix one year after date with interest at the rate of five per cent.

"After a memorandum of these papers was made by the appraisers, the executor took possession of them; and the right of the plaintiff to collect the note or receive the proceeds thereof having been denied by the residuary legatee, an amicable issue was framed between her and the executor to test her right thereto. On the trial there was no dispute as to any of the material facts. It was conclusively proved by the witnesses that the indorsement on the envelope, and the paper of which the foregoing is a copy were both in the handwriting of Mrs. Fosselman, and there was not the slightest evidence to cast any suspicion on the integrity of the transaction. The learned judge submitted the case to the jury with instructions to render a verdict in favor of the plaintiff unless they found that the said indorsement and paper were not genuine, or had been fraudulently altered; subject to the opinion of the court on the question, whether the paper of October 2, 1879, in connection with the accompanying note of same date, and the indorsement on the envelope is a testamentary disposition of the note or the proceeds thereof."

The jury found a verdict for the plaintiff accordingly, subject to the question of law reserved.

The court subsequently, in an opinion by JUNKIN, P. J., entered judgment on the reserved question in favor of the defendant, holding that although the writing inclosed in the envelope was a testamentary paper, yet it was incapable of execution and void for uncertainty because the testatrix had not sufficiently designated the object of her bounty; and that parol evidence was not admissible to explain who was intended by the pronoun "you" con-

tained in the said testamentary writing, and holding further that the indorsement on the envelope was no part of the will and could not be admitted to probate in connection with the inclosed writing.

The plaintiff took this writ, assigning for error the entry of judgment for defendant.

For plaintiff in error, *A. Reed, Esq.*

Contra, Messrs. Frank R. Schell and A. B. Wanner.

Opinion by STERRETT, J. Filed June 13, 1881.

(After stating the facts, *ut supra*). In his opinion on the reserved question, the learned judge has conclusively shown that the paper referred to is testamentary in its character, intended to take effect upon the death of Mrs. Fosselman, and clearly designates the accompanying note as the subject of the bequest. These conclusions are so fully sustained by both reason and authority, that it is unnecessary to add anything to what has been so well said, in the opinion of the court below on that subject.

The only remaining question is whether the testatrix has sufficiently designated the plaintiff as the object of her bounty in the paper that is claimed to operate as a codicil to her will. The court below held that she had not, and accordingly entered judgment in favor of defendant *non obstante veredicto*. In this we think there was error. It is true the testamentary paper of October 2, 1879, does not designate the plaintiff by name, and if we had no written evidence to show who was meant by the pronoun "you," the bequest of the note would be void for uncertainty; but it is a settled fact that the envelope is addressed to the plaintiff, and why should not that indorsement in handwriting of testatrix be taken as part of the testamentary disposition? It is well settled that a will may be written on several separate pieces of paper. It is not even essential to its validity that the different parts should be physically united; it is sufficient if they are connected by their internal sense, or by a coherence and adaptation of parts: *Wickoff's Appeal*, 3 Harris, 281. It was held in *Ginder v. Farnum*, 10 Barr, 98, that where a will is written on several sheets of paper, fastened together by a string, proof by two witnesses of the signature of the testator at the end thereof is sufficient; and the question whether there has been a subsequent fraudulent addition to or alteration of the instrument is for the jury as in other cases. In the *Goods of Wedge*, 2 *W. N. C.*, 14, a portion of a letter was admitted to probate as the will of Jane Wedge, who, on the third page of the letter wrote, and in the presence of two witnesses, as required by the En-

glish Statute, subscribed her name to the following, viz: "When I dey I would like you to burry me and take all I got for your treatment to me and by somethin for your little girl." The subscribing witnesses testified that after the paper was signed and attested, the deceased folded up the letter and in their presence wrote the superscription it bore. In holding that the paper was clearly entitled to probate, the court said: "The letter is addressed to Mrs. Henry Frost and by 'you' the testatrix could mean no other person to be legatee than the person she addressed. I am of opinion, therefore, that the person is executor according to the tenor, and that probate should pass to him." That case is cited with approval in the *Goods of Taylor*, 4 *W. N. C.*, 290, in which Mrs. Taylor made her will in form of a letter addressed on the outside to Sir George Simpson, and after bequeathing her personal effects to her daughter, added the following: "I hereby appoint you my executor to carry this my will into effect."

Administration with the paper annexed, was claimed by the daughter on the ground that no executor was designated in the will; but the address on the letter was admitted to show that by "you" the testatrix meant Sir George Simpson, the person to whom the letter was addressed, and probate was accordingly decreed to him as executor. In both these cases no envelope was used. The letters were in the form generally in use before the introduction of envelopes, but that fact cannot affect the principle. A separate paper inclosed and sealed up in an envelope is just as much a part of the letter as if the name of the person to whom it is addressed was indorsed on the paper itself. There is no room in either case to doubt that the writing inside is addressed to the person whose name is written outside; and so far as security against fraudulent alteration or substitution of one paper for another is concerned, that one is just as safe as the other before the seal is broken. Either of them is more secure than separate papers attached merely by a string, as in *Ginder v. Farnum, supra*.

It is also urged as an objection to considering the address upon the envelope as a part of the testamentary paper, that the former was written after the other was signed, and therefore the letter should not be considered as having been signed at the end thereof, as the statute requires; but the objection is without merit. It assumes what may or may not have been the fact. It is not an uncommon thing for persons to indorse the address before writing the letter; but if it were shown affirmatively that the address on the envelope was written last in order

of time, it would be unimportant. The natural order of reading ought to control, that is, the name of the party addressed first, and then what is written to or concerning him. If the signature of the writer is appended to what is written, it fully meets the requirements of the statute. Without pursuing the subject further, we are of opinion that the inscription on the envelope should be read as the preface to and in connection with the paper inclosed therein, and that they together constitute a valid testamentary disposition of the accompanying note, operating as a codicil to the will of the testatrix.

Judgment reversed and judgment is now entered in favor of the plaintiff on the question of law reserved.

KISTER v. REESER.

The clause of the deed in dispute is as follows: "This is part of a large tract of land of the said William Reeser, in Newberry township, the said William Reeser doth reserve a road ten feet wide along the line of Joseph Burger, to be shut at each end with a bar or gate:"

Held (reversing the court below), that this clause was a reservation only, and would not sustain a claim to a right of way after the death of the grantor.

The word "road" in this clause means the reservation of a way.

A reservation is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted, and is distinguished from an exception in that it is of a new right or interest.

An exception is always of part of the thing granted, it is of the whole of the part excepted.

Writ of error to the Court of Common Pleas of York county.

On the 13th of September, A. D. 1865, William Reeser, of Newberry township, in the county of York, Pa., was the owner in fee of a tract of land, situate in said Newberry township, and on the day and year aforesaid, joined by his wife Elizabeth, by deed granted and conveyed unto Henry H. Drorbaugh, his heirs and assigns, nineteen acres and thirty-five perches of said tract of land. This deed of conveyance contained the following words: "This is part of a large tract of land of the said William Reeser, in Newberry township, the said William Reeser doth reserve a road ten feet wide along the line of Joseph Burger, to be shut at each end with a bar or gate." On the 13th day of November, A. D. 1867, said Henry H. Drorbaugh and Sarah, his wife, by their deed duly executed, granted and conveyed said 19 acres and 35 perches of land to Isaac Frazer, his heirs and assigns. "This being the same tract of land that William Reeser deeded to Henry H. Drorbaugh by deed dated the 30th day of September, A. D. one thousand eight hundred and sixty-five, wherein said William Reeser reserves a

road ten feet in width along the line of Joseph Burger's land, to be shut at each end with a bar or gate."

On the 9th of December, A. D. 1867, Isaac Frazer and wife, by their deed, duly executed, granted and conveyed the same tract of land to Isaac Kister, the plaintiff in error, his heirs and assigns. "This being the same tract of land that William Reeser deeded to Henry H. Drorbaugh by deed dated the 30th day of September, A. D. one thousand eight hundred and sixty-five, wherein said William Reeser reserves a road ten feet in width along the line of Joseph Burger's land, to be closed at each end with a bar or gate."

Isaac Kister, the plaintiff in error, went into the possession of said tract of land shortly after the delivery of the deed to him in 1867, and has remained in possession since said time.

William Reeser died in March, A. D. 1862.

William Reeser's rights under the reservation were not questioned during his lifetime.

George Reeser, Sr., one of the defendants, became the owner of a portion of the remainder of the tract of William Reeser, by deed from his father, William Reeser, dated the 3d day of March, A. D. 1872, and continues to own the same and claims under the reservation in the deed of said William Reeser to Henry H. Drorbaugh, the use of a ten feet wide way over the land of Isaac Kister, the plaintiff in error, along the line of Joseph Burger. No mention of the privilege of any road is given or granted in deed from William Reeser to said George Reeser, Sr.

A few days before the — day of April, A. D. 1880, Isaac Kister, the plaintiff, placed a permanent fence at each end of the line of reservation mentioned in the deed of William Reeser to Drorbaugh.

On the 27th day of April, 1880, the defendants in error and defendants below pried up and broke down said fences of the plaintiff and entered upon his lands and drove a wagon and team across the same; and for this trespass this suit is brought to recover damages. To avoid controversy and save time on the trial of the case, the damages were agreed upon by the parties to be \$400.

The following points were submitted to the court below by the plaintiff:

1. That if the jury believe from the evidence that there was no road in existence over the plaintiff's close, along the Burger line, where the road is now claimed under the reservation in the deed from Reeser to Drorbaugh, at the time when said deed was executed, then the reservation in said deed does not extend beyond the life of William Reeser, deceased, and ceased

and determined with his death on the — day of March, A. D. 1872, and the defendants have not justified the trespass proven in this case; and the plaintiff is entitled to recover.

2. That if the jury believe that the defendants, or any of them, did drive over the close now owned by the plaintiff, before the execution of the deed from Reeser to Drorbaugh, while the 19 acre lot and the land of the defendant, George Reeser, Sr., was owned by William Reeser, Sr., a few times a year to haul wood from other land of said William Reeser, Sr., such occasional use would not establish such a road as the defendants could use after the death of William Reeser, Sr., or which will justify their entry on the land of the plaintiff under the reservation in the deed aforesaid, and the plaintiff is entitled to recover for the trespass proven in this case.

3. If the jury believe the trespass complained of was committed, then the words of the reservation in the deed from Reeser to Drorbaugh do not justify said trespass, if said William Reeser, the grantor, had died prior to the committing of said trespass. These points were answered in the negative.

The defendants submitted the following points:

1. That the rights of the parties in this case depend upon the true intent and meaning of the deed of William Reeser, Sr., to Henry H. Drorbaugh, dated September 30, 1865; that the reservation by the grantor therein of a road ten feet wide, operated by way of exception, to take out of the grant a portion of the land ten feet wide, along the line of Joseph Burger, for a road, and runs with the land and inures to the benefit of the assigns of said grantor, although they are not named in the reservation.

2. That under the legal effect of the reservation in said deed, the portion of land ten feet wide along the line of Joseph Burger, for the use of a road, is excepted out of the grant, and remained as it was before for the purpose of a road: that the evident purpose of said reservation was to furnish egress and regress from the other lands of the grantor to and from the public road leading to Goldsboro', and the defendant being the owner of those other lands, had a legal right to pass in and out to said public road, over the said land reserved in said deed, and committed no trespass in doing so.

3. That upon the law and evidence in this case the plaintiff is not entitled to recover.

To which the court made the following answers:

1. The rights of the parties in this case depend upon the proper construction of the reser-

vation in the deed of William Reeser, Sr., and wife, to Henry H. Drorbaugh, dated September 30, 1865. That reservation is a general one, and inures to the benefit of the defendant as owner of a portion of the land conveyed by Reeser and wife to Drorbaugh.

2. That under the reservation in the deed of William Reeser and wife to Henry H. Drorbaugh for 19 acres and 35 perches, dated September 30, 1865, the defendant had a legal right to pass over the road reserved in said deed, and did not commit a trespass in entering as he did the premises of the plaintiff.

3. The court read the defendants' third point and answered it in the affirmative.

The Court below, FISHER, P. J., delivered no charge to the jury, excepting the above answers, and instructed them to find for the defendants.

The court's answers, the admission in evidence of the deeds from the original grantor to the grantors of the present defendants, and the instruction to the jury to find for the defendants, were assigned as error on the part of the court below.

For plaintiff in error, *Messrs. John W. Bittinger and V. K. Keesey.*

Contra, W. C. Chapman, Esq.

Opinion by TRUNKY, J. Filed June 25, 1881.

William Reeser, by deed dated September 13, 1865, conveyed to Drorbaugh part of a tract of land which he then owned, and Drorbaugh's title has been vested in the plaintiff. The deed contains this clause: "The said William Reeser doth reserve a road ten feet wide along the line of Joseph Burger, to be shut at each end with a bar or gate." Prior to the conveyance there was neither a public nor private road over the land. The owner in fee of land may travel over it when and where he pleases, and it would be vain to speak of his right of way within his lines. William Reeser died in 1872. The court properly treated the question as one of law; for, aside from the conceded facts, there was no evidence to affect the construction of the deed or clause of reservation. If that clause is an exception of land ten feet wide next to Burger's line, the plaintiff was not entitled to recover. But if it is a reservation of a way over said land, the defendants were trespassers.

The land was granted in fee and a road reserved next Burger's line. This was to be shut at each end, and subject to the grantor's use for a road; the grantee could enjoy it for all purposes. The word road has never been defined to mean land; it is difficult to find a definition which does not include the sense of way, though the latter word is more generic, referring to many

things besides roads. Road is generally applied to highway, street or lane, often to a passway or private way, yet strictly it means only one particular kind of way. Its sense in this deed is very clear. Taking the entire clause, with reference to the grant, it means the reservation of a way. This is as plain as if the word way were in place of road. Lawyer and layman alike would understand the word road in this clause in the same sense as it is used in the statute providing for grants of "private roads." A private road obtained by proceedings under those statutes is a mere way, the owner of the way having no interest in the land.

A private way is an incorporeal hereditament of a real nature, entirely different from common highway; it is "the right of going over another man's ground."

Where land is granted and the right of way is reserved that right becomes a new thing, derived from the land; and although, before the deed, the grantor had the right of way over the land whenever he chose to exercise it, yet when he conveyed the land the reservation was a thing separated from the right of the grantee in the land: *State v. Wilson*, 46 Maine, 9. A reservation is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted. It is distinguished from an exception in that it is of a new right or interest. An exception is always part of the thing granted, it is of the whole of the part excepted. A reservation may be of a right or interest in the particular part which it effects. These terms are often used in the same sense, the technical distinction being disregarded. Though apt words of reservation be used they will be construed as an exception, if such was the design of the parties. Thus, when a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," it was held that the saving clause operated as an exception of the coal. The coal was land and the reservation of that part of the land excepted it from the grant. It was a thing corporate, existed when the grant was made, and differed from something newly created, as a rent or other interest strictly incorporeal: *Whitaker v. Brown*, 10 Wright, 197.

Here the saving clause created the way over part of the land granted, a right strictly incorporeal, and is not an exception of part of the land contained in the grant.

Judgment reversed and venire facias de novo awarded.

HERRING AND WIFE v. THE CITY OF PHILADELPHIA.

A judgment which was in fact rendered in favor of a plaintiff on November 4, 1865, was omitted to be entered on the appearance docket, although duly noted on the judgment index, and followed by a *levari facias* and sale. On November 25, 1879, a rule was taken to enter the said judgment *nunc pro tunc* on the appearance docket, which was made absolute, and the judgment so entered December 6, 1879, as of November 4, 1865.

Held, that the court had inherent power to so perfect its record. Also that the record thus amended was conclusive, and that a writ of error sued out in 1879 is too late to question the validity of the said judgment of November 4, 1865.

Error to the Court of Common Pleas, No. 4, of Philadelphia county.

Opinion by STERRETT, J. Filed January 24, 1881.

The inherent power of every court of record to require its proceedings to be faithfully recorded and preserved cannot be questioned. It existed at common law, independently of any statute of amendment; and, in the absence of any legislative restriction, it may be rightly exercised by the court in replacing lost records, or in supplying accidental omissions of its clerk, so as to make the record of its proceedings conform to the fact. When, therefore, it satisfactorily appears that the proper officer has neglected to record any material part of a judicial proceeding, it is clearly competent for the court to remedy the defect by amendment, so that each successive step in the proceeding, as it actually occurred, may be correctly represented by the record.

It was claimed by the plaintiff below, that while judgment was in fact rendered in his favor against the defendant, on November 4, 1865, the prothonotary had neglected to make an entry thereof on the appearance docket. It was duly noted on the judgment docket; the *levari facias*, reciting a judgment of that date, was issued, executed, and a deed for the premises acknowledged and delivered in 1866, under the belief that the judgment had been regularly recorded at the time of its rendition. After the omission was discovered, the court granted a rule on the executrix and sole devisee of Henry Gault, the defendant, as whose property the premises were sold, to show cause why the judgment should not be recorded *nunc pro tunc*. Testimony was taken, and the court having found the facts as claimed by the plaintiff, made an order "that the record be amended by entering upon the appearance docket, in its proper place, the judgment in favor of the plaintiff for \$24.90, which was rendered on the

4th of November, 1865, and that the said judgment be so entered as of the 4th of November, 1865, *nunc pro tunc*, it being evident to the court that the said entry was accidentally omitted by the clerk."

In view of the evidence upon which the court appears to have acted, we cannot say there was error in the conclusions of fact on which the order was based, or in recording the judgment as of the date on which it was actually rendered. On the contrary, we think the authority of the court in the premises was judiciously exercised; and the record, as now before us, must be regarded as conclusively showing a judgment rendered and recorded on November 4, 1865. This being so, it is clearly too late to question its validity on a writ of error sued out in 1879. The Act of April 1, 1874, provides that no judgment shall be avoided or reversed for any error or defect therein, unless the writ be taken within two years.

The fact that the omission of the prothonotary was not supplied during the term in which the mistake occurred does not present an insuperable difficulty. In *Rhoads v. Commonwealth*, 3 Harris, 272, Chief Justice GIBSON said: "The old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, convenience and common sense. Countless instances of amendments after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors. The power of the court to amend being established, the conclusiveness of the record, as amended, follows of course." In that case a decree forfeiting a recognizance had been pronounced, but not recorded, and, at a subsequent term, the court ordered the decree to be entered on the record as of the time the recognizance was actually forfeited. The same principle was recognized in *Kennedy v. Wachsmuth*, 12 S. & R., 171. Real estate had been sold by an administrator pursuant to an order of the Orphans' Court, and the sale confirmed without any record having been made of the verified schedule of debts required by the Act of 1794. The court afterwards found as a fact that the schedule had been properly verified and presented before the order of sale was made, and the record was corrected accordingly. It was contended that the amendment was unauthorized, and the proceeding fatally defective; but this court said the power to order the amendment could not be doubted; that while the affirmation should have been recorded at the time it was made, the neglect to enter it of record "was no more than a clerical omission. So long ago as the year 1650, an amendment

was permitted by causing judgment to be entered on a verdict which the prothonotary had omitted, and this, too, after the execution had issued and exception was taken to the proceeding: Stiles' Rep., 229. In considering the record before us, therefore, we must take it that the affirmation of Lewis was made previous to the order of sale. Then all is right, for the record cannot be contradicted."

The view we have taken of the order to record the judgment as of the time it was actually rendered, and the conclusive effect that must now be given to the record as thus amended, renders it unnecessary to consider other questions that were so ably pressed on the argument by the learned counsel for the plaintiff in error.

The original defendant being dead, the court very properly directed the rule to show cause to be served on his executrix and sole devisee. She with her husband appeared against the rule, and thus substantially, though not formally, became a party to the record. As such, she had the same right to a writ of error as the defendant, if living, would have had. But, as we have seen, the omission of the prothonotary was properly supplied by the court, and the judgment cannot now be successfully assailed.

Judgment affirmed.

For plaintiff in error, *Messrs. Andrew Zaue and David C. Harrington.*

Contra, B. F. Fisher, Esq.

EBY v. HOOPES.

In the absence of evidence tending to show an intention to pay and receive securities assigned as satisfaction of a debt in whole or in part, the law presumes that they were assigned only as collateral.

If the debtor offers no evidence to prove that they were taken in payment, then the judge should instruct the jury that the law presumes them to have been taken as collateral.

Error to the Court of Common Pleas of Lancaster county.

Opinion by GREEN, J. Filed June 6, 1881.

The learned judge of the court below in his general charge, correctly stated the law relative to the assignment of securities by a debtor to a creditor. Whether such assignment is in payment or as collateral security, is certainly a question of intention depending upon the testimony in the particular case. In the absence of evidence tending to show an intention to pay and receive the securities assigned as satisfaction of the debt, in whole or in part, the law presumes that they were assigned only as collateral. The duty of establishing the contrary is affirmative, and it rests upon the debtor. If he fails to perform this duty, the law makes a positive inference that the assignment is only as collat-

eral security, and that inference is substantial evidence upon which the creditor may rely. The circumstance that the assignment of the security is absolute in form is of no consequence on the question of intention, because the assignment simply operates to transfer the title. Nor is the legal effect of the assignment dependent upon other relations which may subsist between the parties. Whether they be husband and wife, or parent and child, or strangers in blood, can make no difference when the one relation of debtor and creditor is under consideration, and there are no special circumstances affecting the case. In *Leas v. James*, 10 S. & R., 315, this court said, TILGHMAN, C. J.: "When the defendants set up the assignment of the bonds as a payment it is incumbent on them to prove that it was so intended. The writing itself shows no such thing, and in cases where a chose in action is assigned by the debtor to the creditor, I think the presumption is that it was not intended as an absolute payment unless it is so expressed. The reason of this presumption is that such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another."

We said, in the case of *Perit v. Pittfield*, 5 Rawle, 171: "The general principle is that property placed by the debtor in the hands of the creditor is not to be construed as received in full discharge of the debt, unless that plainly appears to have been the intention of the parties."

In *Jones v. Johnson*, 3 W. & S., 278, GIBSON, C. J., said: "There are presumptions which operate even in cases of intention as *prima facie* evidence on the one side or the other; for instance, that a bond given by a stranger after the debt incurred was accepted as collateral security." The learned judge of the court below, in his answer to the defendant's third point, said: "When an absolute assignment is made by a husband to a wife of a judgment or mortgage, there is no presumption of law that it or they are assigned as collateral security independent of proof that they were so accepted." As an abstract proposition, independent of any relation of debtor and creditor existing between the husband and wife, this is true; but it is said, in an action at law where that relation does exist, and the husband, who is the debtor, is seeking to have an inference of payment affixed to a mere transfer of security by himself to his wife, because it was absolute in form; when said in such a connection, and between parties so circumstanced, it tended to mislead the jury, and was, therefore, erroneous.

This is still more apparent when we consider the answer to the defendant's fourth point, which was, "that there is no evidence that either the Lewis mortgage, or the Markwood judgment, was assigned as collateral," to which the court answered, "that they have no knowledge of such evidence, but that the evidence in the case is for the jury, and whether there is such evidence is for the jury to determine." This answer entirely ignores the force of the legal presumption, which is in itself evidence that the securities in question were assigned as collateral.

This evidence there was in the case, and the court should have so said to the jury, instead of leaving it to them to say whether there was any such evidence. Upon these two answers the jury were at liberty to infer that unless there was affirmative evidence on the part of the plaintiff showing that the mortgage and bond were taken as collateral only, they were really taken as payment. This would shift the burden of proof from the debtor to the creditor, who required no proof, having already a legal presumption, which in itself was evidence that the assignment was as collateral and not as payment. For these reasons the judgment must be reversed.

Judgment reversed and a venire facias de novo awarded.

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BAIR v. BLACK.

A writ of error issued one day after the expiration of two years from the date of the judgment in the court below is too late, and will be quashed. The fact that the *precipe* was dated and mailed on the last day of the two years, but not received by the prothonotary until the following day, will not cure the defect.

Error to the Court of Common Pleas of York county.

Ejectment, brought to April Term, 1871, for a parcel of land on the canal shore of the Susquehanna river, in York county. The case was tried January 25, 1877, when a verdict was rendered for the plaintiff. Judgment was entered on the verdict November 24, 1877. The plaintiff's counsel, who resided in York, signed a *precipe* and affidavit for a writ of error November 24, 1879, and mailed it on the same day to the prothonotary of the Middle District, at Harrisburg, who received it on the next day, November 25, and on that day issued the writ of error, which was received and filed in the court below November 26, 1879.

When the case was called for argument in the Supreme Court,

Edward Champneys, Esq., for the defendant in error, moved to quash the writ of error on

the ground that it was not "commenced * * * within two years * * * after judgment signed or entered of record," as provided by the Act of April 1, 1874, P. L., 50; *Purd. Dig., Supplement*, p. 1873, pl. 1.

For plaintiff in error, *Messrs. Thomas E. Cochran and Hay.*

PER CURIAM. Filed May 16, 1881.

The judgment in this case in the court below was entered November 24, 1877. The writ of error was issued November 25, 1879. The date of the *precipe* for the writ cannot help the case. The two years' limitation had already expired when the writ issued, and the motion to quash must therefore be granted.

Writ of error quashed.

District Court, United States.

Western District of Pennsylvania.

IN ADMIRALTY.

HATCH v. THE STEAM-BOAT "BOSTON."

A verdict and judgment against the owners of a vessel in a suit to charge them personally with the penalties incurred under Section 4465 of the Revised Statutes for carrying a greater number of passengers than was stated in the certificate of inspection, is not conclusive against their vendees in a subsequent suit *in rem* in admiralty to enforce against the vessel the lien of the penalties under section 4469.

The title to the vessel not being involved in the former suit, nor any question of lien: *Held*, that the new owners were not privies to the suit against their vendors, and they might show in the suit *in rem* that the number of passengers illegally carried was less than the jury found in the first suit.

Sur libel, answer and proofs.

Opinion by ACHESON, D. J. Filed August 24, 1881.

In overruling the motion to dismiss the libel, the court disposed of all the questions in this case save one, viz: are the present owners of the Boston concluded by the verdict and judgment in the former suit brought by this libellant against the then owners of the vessel personally to charge them with the penalties incurred under Section 4465 of the Revised Statutes, for carrying a greater number of passengers than was stated in the certificate of inspection? The libellant contends that the defendants are so concluded although they did not become purchasers of the boat until after the penalties were incurred. But the libellant did not stand upon the record of the former action, but went into original evidence to show the violation of the statute. From this evidence it now very clearly appears that the number of passengers unlawfully carried was

one hundred and thirty only, and not one hundred and seventy, as the jury found in the former trial. By the libellant's own proofs, therefore, it is plain that the verdict was excessive to the extent of \$404. Nevertheless, he claims a decree upon the basis of the erroneous verdict and the judgment entered thereon. Must such injustice receive judicial sanction? Shall the libellant have a decree against his own proofs?

Upon what principle are the defendants concluded by the former suit? It was not a proceeding *in rem* against the vessel, but a personal action against the then defendants for penalties personally incurred by them. To that suit it is certain the present defendants were not parties. Were they privies so as to be bound by the result? I am of opinion that they were not. They were not personally liable for the penalties sued for. It is true between the former owners of the Boston and these defendants (who are their vendees) there is privity of title. But the title to the vessel was not involved in the former suit; nor did that suit involve any question of lien. Neither did the judgment therein obtained become a lien on the Boston. At the date of that judgment the title to the vessel was in the present defendants; and this suit is not to enforce that judgment. It is an original suit *in rem* in admiralty to enforce the lien created by Section 4469 of the Revised Statutes, which makes said penalties a lien upon the vessel. And now for the first time the present owners have an opportunity to be heard in answer to the claim. Very strange would it be, therefore, were they shut off from all defense by a proceeding to which they were not parties.

After judgment against the mortgagor in a suit to which the terre-tenant was not a party, the latter in an ejectment brought against him by the sheriff's vendee, can prove that the debt was paid: *Mather v. Clark*, 1 Watts, 491. And the same principle was held in *Commonwealth v. Duncan*, 8 Pa. St., 93, which was a *scire facias* upon a recognizance.

At best this is a hard case upon these defendants. But to compel them to pay \$404 in excess of the penalties which the vessel actually incurred, would be shocking injustice which no court would tolerate unless constrained by some unbending rule of law. Happily no sound principle is violated by deciding the cause upon its merits as now disclosed by the proofs.

Let a decree be drawn in favor of the libellant for \$1,313, with costs.

For libellant, *Messrs. H. H. McCormick and Wier & Gibson.*

For respondents, *Messrs. Barton & Sons.*

Orphans' Court.

In Re Estate of GERTRUDE ZWEIDINGER, Deceased.

H, as executor, had a claim against Z. Subsequently H individually became a voluntary creditor of Z, who became insolvent and assigned certain assets generally to H. Held, that the trust-claim had a right of preference in respect of these assets.

Exceptions to the third account of P. Haberman, Executor.

(1.) Gertrude Zweidinger died in August, 1874, leaving a will of which she appointed Peter Haberman executor. She had been engaged in the sale of music and musical instruments, assisted by her son John C. Zweidinger. In September, 1874, her executor, Mr. Haberman, sold her stock in trade to her son John, who was then about twenty years of age, for the sum of \$13,757.84, for which he took a mortgage of the value of \$3,000 given by one — Weiland and subsequently a judgment note from John on his arrival at majority. The business was thenceforward carried on by John until in March, 1876, when eastern creditors having threatened execution, Mr. Haberman entered up said judgment note, issued execution thereon and sold the stock for the sum of \$2,220.15. Of the stock thus sold, Haberman bought to the amount of \$2,154.77, and continued the business in his own name until September 1, 1879, when he sold out to said Weiland, in consideration of the sum of \$2,500 cash, and the satisfaction of the Weiland mortgage above mentioned as having been given as collateral security for John C. Zweidinger's purchase.

It appears that John C. Zweidinger had made one payment of \$800 and another of \$1,900 in cash; but whether on account of his purchase does not clearly appear. In addition to this he assigned, about the time of the sheriff's sale, leases, etc., to Haberman on which the latter collected \$14,460.41. Haberman alleges that John was indebted to the estate on account of his purchase above mentioned in the sum of \$13,757.84 and to him individually on subsequent transactions as follows, viz:

Bills collected for him as executor and not paid over.....	\$4,900 00
Piano sold for Zweidinger's estate.....	1,500 00
Bills collected for John Zweidinger's estate.....	1,100 00
Money borrowed and used in his business.....	2,000 00

And that his assignment was made generally on account of all these claims.

The executor has filed three accounts—the first in 1876, the second in 1878, and the present in 1880. He credits himself in the first with the whole amount agreed to be paid by John C.

Zweidinger for stock, etc., \$13,757.84 as being uncollected. In the second he charges himself with the sum of \$5,400 "realized out of stock in store." This has reference to the stock bought at sheriff's sale at \$2,154.77 above mentioned and subsequently sold by Haberman in his own name. There is no reference to the claim against John C. Zweidinger in the debit side of the present account, and exceptants seek to surcharge accountant with the balance due thereon.

(2.) The exceptants also claim that accountant has failed to charge himself with a large number of bills collected by him; but as the evidence is not clear and there will soon be a final account, parties are desirous that this matter be postponed.

Opinion by HAWKINS, P. J. Filed September 17, 1881.

As between the claim of the estate and that of Peter Haberman individually, against John C. Zweidinger, the paramount duty of the executor was to take care of the interests of the estate. Its claim was first in point of inception and gave rise to a duty on the part of the executor to collect the whole amount of it by every legal and reasonable means. That duty the executor assumed and he could voluntarily assume no new relation which would interfere with its performance. His individual claim was not only subsequent in point of time but was purely voluntary and must therefore be treated as having been contracted subject to the claim of the estate. That the assignment of John C. Zweidinger was made generally cannot excuse the executor from the performance of his duty to the estate. He had the means in his power to have compelled by attachment the appropriation of the assets embraced in the assignment toward the payment of the estate's judgment. That an assignment was made at all was no doubt owing to the position in which this judgment placed the debtor. Haberman was not in a position to compel assignment through his individual claims; they were not in judgment. But in any event the claim of the estate had a right of preference by virtue of his prior assumption of the trust, and the insolvency of the debtor, demonstrated as it was by the execution issued by the executor himself, made the enforcement of that preference necessary to the collection of the claim.

The circumstances of this case should have "induced increased attention to the recovery of the amount due" the estate: *Long's Estate*, 6 W., 47. They seem to have had the opposite effect on this executor. Notwithstanding the known insolvency of the debtor and the prior

claims of the trust, he declares that he accepted the assignment on general account of his own and the estates claims; and in the face of this declaration, the record shows that he appropriated the whole proceeds of the assignment to his own use in exclusion of the estate. The assignment was not alluded to in either of the two accounts filed since it was made; and that it existed at all was only developed here on cross-examination.

(2.) The executor's appropriation to his own use of the Weiland mortgage is another fact worthy of special notice. Notwithstanding the fact that that mortgage was given as part security for the estates claim against John C. Zweidinger, it formed part of the consideration in the sale made by Haberman to Weiland, and is nowhere credited to the estate. This was a devastavit for which the executor would clearly be liable, if necessary, to the satisfaction of the estates claim.

(3.) As between the estate and John C. Zweidinger, the amount for which the latter's stock in trade was sold at sheriff's sale, viz: \$2,220.15, is the amount to which he is entitled to credit on that account, and not the amount with which the executor charges himself as having been realized out of the goods purchased by him for the estate, viz: \$5,400. The difference between these amounts is the profit made out of the goods purchased and belongs to the estate. The credit of \$2,220.15 simply stopped interest on that amount in favor of Zweidinger.

(4.) As the dates of the cash payments made by Zweidinger on account were not furnished by the executor, he is charged as of the date of the expiration of the year when distribution should have been made; and by way of analogy he is allowed a year after the assignment was made for the collection of the assets embraced in it.

For accountant, *Messrs. H. & G. C. Burgwin.*

For exceptants, *Messrs. W. S. Pruviance and Breil & Fitzpatrick.*

—We have received the following pamphlets, etc.: *Suggestions to Young Lawyers.* An Address delivered at the Commencement of Columbia College Law School, May 18, 1881. By Courtlandt Parker.

—Catalogue of Law Books, published and for sale by William Gould & Son, Law Booksellers and Publishers, Albany, N. Y. This catalogue is furnished free to all applying for it. It contains a great deal of information about courts, authors, law books, periodicals, etc., not readily obtainable elsewhere, and will prove a useful addition to every library.

NEW BOOKS.

THE NORTH WESTERN REPORTER, containing all the decisions of the Supreme Courts of Minnesota, Wisconsin, Iowa, Michigan, Nebraska and Dakota. HOMER C. ELLER, Editor. Vols. III, IV, V, VI and VII. St. Paul: WEST PUBLISHING COMPANY.

The above volumes contain all the cases decided in the Supreme Courts of the States named, from November 22, 1879, to January 19, 1881, and exclusive of indexes contain five thousand and two pages of reports. As we have before explained the *Reporter* is published weekly, each part containing the latest opinions and varying in size from sixteen to two or three hundred pages, as the supply of cases may require. At suitable intervals an index is furnished and a new volume commenced, there being about four volumes issued a year. As soon as the cases are reported in the regular State Reports a "special table of cases" giving the volume and page at which each case appears, is furnished to subscribers, thereby obviating the trouble of referring to their own reports when citing cases. By this system of reporting the opinions of the courts of six States are furnished at the price that those of any one State could be procured separately. The *syllabi* are ample and accurate, and, everything considered, it is undoubtedly the cheapest law publication in the United States.

A DIGEST OF THE LAW OF BILLS OF EXCHANGE, Promissory Notes and Checks. By M. D. CHALMERS, M. A., of the Inner Temple, Barrister at Law. Rewritten and adapted to the law as it exists in the United States, by W. E. BENJAMIN, A. M. Chicago: C'ALAGHAN & Co. 1881.

The editor states that he "has endeavored to rewrite the book as Chalmers would have written it had he been an American," and that in rewriting it he has incorporated his own work with that of the author. The plan of the work is the same as that of Stephens' Digests of the Law of Evidence and of the Criminal Law. General propositions are first stated, then qualifications or less obvious deductions, when of sufficient importance, given in the form of explanations, and then the exceptions, if any. Each general proposition, with its accompanying "explanations" and "exceptions," forms a separate article. This method has many advantages and bids fair to be extensively used in the preparation of text books. The work before us gives evidence of careful study on the part of both author and editor, and we have no hesitation in recommending it to the favorable consideration of the profession.

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No. 9.

PITTSBURGH, PA., OCTOBER 12, 1881.

Supreme Court, Penn'a.**M. P. STACK, Plaintiff Below, v. WM. O'HARA.**

In the United States the Catholic Church is missionary, and those who enter its priesthood obligate themselves to serve the missions of the Diocese, under the obedience of the Bishop.

Both Bishop and priest are bound to obey the laws of their church which are applicable to the missions in this country, and these laws define and limit the authority of the one and the obedience of the other.

The Bishop has power to appoint the priest to a mission and to recall him thence, the priest being removable at the will of the Bishop; but the Bishop should use his right of removal only for grave reasons.

Removal may be made without assigning cause, without supposition of wrong done by the priest, and the priest is not entitled to a previous trial as he would be if accused of an ecclesiastical offense; and if he feel aggrieved his remedy is by recourse to the Bishop's superior.

Where the Bishop officially removes a priest it will be presumed that it was for sufficient cause, and the priest will not be entitled to recover damages of the Bishop, unless the evidence shows that he was wrongfully and unlawfully removed from his charge.

The profession of priest or minister in any denomination is held subject to its laws; the priest acquired it by compact, and is not exempt from the proper discipline and authority of his church; he has no property in his profession that shields him from the consequences of his broken vows and compacts.

It is a universal rule that one who becomes a member of any church thereby consents to be governed by its rules and laws, and he cannot justly claim to have suffered wrong by the enforcement of such rules or laws upon himself and his property.

Courts will not interfere with the internal police and discipline of churches so long as they keep within the reasonable application of their own rules, which were known, or might have been known upon inquiry, to the members at the time they became members.

Where the removal of a priest is in accord with the rules and laws of his church, which were known to him when he was ordained, it is a result of his contract, and is not contrary to the law of the land.

The Bishop wrote to the priest, Your administration of the affairs of the church has been such that I feel compelled to remove you: *Held*, that this implies bad administration which may be without commission of an ecclesiastical offense; that it is not a criminal accusation; and that if the words admit of two constructions, that shall be taken which accords with the lawfulness of the accompanying act.

A decree by the court below in a prior suit in equity, that the act of removal was unlawful, that the prohibition was unlawful, and that the defendant pay the costs, except the plaintiff's bill, was affirmed in this court, and afterwards a motion for reargument was refused on the ground that the decree did not settle

anything as to the rights and powers of the Bishop over the priest, and nothing was decided but the question of costs: *Held*, that, substantially, the bill was dismissed without prejudice.

Error to the Court of Common Pleas of Lycoming county.

Opinion by TRUNKEY, J. Filed October 3, 1881.

When the plaintiff was ordained he obligated himself as follows: "I, Michael P. Stack, promise and swear that I will serve the missions of the Diocese of Philadelphia under the obedience of the ordinary forever in perpetuum, so help me God, and these His holy gospels." Toward the end of the ceremony he placed his hands in those of the Bishop, who then asked him, "Do you promise to me and my successors obedience and reverence?" and he answered, "I do promise it."

In the United States the Catholic Church is missionary, and there are no parish priests except, perhaps, in a portion of the territory acquired from France. The plaintiff assumed to discharge the functions of a priest in the missions of the Diocese. Since his ordination the Diocese of Scranton has been created out of territory formerly within the territory of the Diocese of Philadelphia and his obedience and reverence became due to the Bishop of Scranton. Both Bishop and priest in their respective relations are bound by the laws of their church which are applicable to the missions in this country, and these laws define and limit the authority of the one and the obedience of the other.

The primary inquiry is, whether a priest appointed by his Bishop to a mission in the Diocese is removable at the will of the Bishop? This question was not submitted to the jury, but the court instructed them that under the law of the church a Bishop has not only the right but it is his duty to remove a priest for sufficient cause. A number of the assignments of error are based on that instruction. However much the plaintiff differs from all the other witnesses respecting the unwritten law, or in his inferences from the written, there is no conflict in the testimony as to what the written law is which touches the question. Both parties concede the applicability of the enactments of the Baltimore Plenary Council of 1866, a portion of which is proved by each. Paragraph 108 is thus rendered by Dr. Corcoran: "We confirm and again promulgate some decrees that have been passed by former Councils of Baltimore. Whereas, very often it has been called into doubt by some whether prelates of the church had power in these States of the

Union to depute priests, send them into another part of their Diocese for the purposes of the sacred ministry and also recall them when they judge fit in the Lord, we admonish all priests who live in the Diocese, whether ordained therein or admitted into the same, that mindful of the promise that they have made at their ordination, they refuse not to attend any mission that shall be assigned them by their Bishop, if the Bishop judge it sufficient for the decent sustenance of their livelihood and consider also that that office be suitable to their strength and health. By this adjudication, however, we wish to change nothing as to those priests who hold Parochial Benefices, of which one only, to wit, in the City of New Orleans, is as yet known to exist in this country. Nor do we by any means intend to derogate from the privileges that have been accorded to religious persons by the Holy See. Confirming the duty of the priest to attend any mission that may be assigned to him, and recognizing the power of the Bishop to appoint him thereto or recall him thence."

The plaintiff gives paragraphs 123 and 124 as follows: "Since formerly there existed by the highest, by the best right, as the Council of Trent says, district Dioceses and parishes and proper pastors were given to each flock and there were rectors of minor or inferior churches who should have the care, each one of his own flock, it is altogether desirable that according to the custom of the Universal Church, parish priests, properly so-called, as they exist in Catholic countries, should be constituted also in churches of our provinces; but such is the condition of our times and circumstances that this cannot yet be done. The fathers of this Plenary Council, however, are of the sentiment, their mind is, that gradually and as far as circumstances will allow, our discipline in this matter may be conformed to the discipline of the Universal Church or the universal discipline of the church." "We will, therefore, or wish that through all these provinces, especially in the larger cities where there are many churches, a district after the manner of a parish, with accurately described limits, be assigned to each church, and that the rector thereof be accorded the rights parochial or *quasi* parochial rights."

And Dr. Corcoran states paragraph 125 thus: "By making use of the words 'parochial right,' 'parish' and 'parish priest,' we by no means intend to accord to the rector of any church that right which is called immovability, or to take away or in anywise diminish that power which from the discipline received in these provinces the Bishop possesses of depriving

any priest of his office or transferring him elsewhere. But we admonish and exhort all Bishops that they should use this their right only for grave reasons and take into full consideration the personal merits of the individual."

These provisions in enactments, specially made for the church in the United States, are too plain to admit of doubt as to the Bishop's power to remove a priest. Their interpretation was for the court: *Sidwell v. Evans*, 1 P. & W., 383; *Bock v. Laman*, 12 Harris, 435. When the testimony is of unwritten law only and is conflicting a different case is presented of which we need not speak. The Council expressed a strong desire that parish priests as they exist in Catholic countries should be constituted here, but declare the condition of our times and circumstances such that this cannot yet be done. Although they will or wish that in these provinces, in localities where there are many churches, a district after the manner of a parish, may be assigned to each church, and that to the rector may be accorded the right parochial or *quasi* parochial rights, they proclaim that it is not in anywise intended to diminish that power the Bishop possesses of depriving a priest of his office or transferring him elsewhere. They confirm and again promulgate the duty of the priest to attend any mission that may be assigned to him, and recognize the power of the Bishop to appoint him thereto or recall him thence.

The pastoral relation is neither created nor dissolved by agreement between the priest and congregation. The Bishop appoints and removes the shepherd as he deems for the priest's good or for the interest of the flock.

Removal is the exercise of Episcopal authority, according to the Bishop's judgment. It may be without supposition of wrong and it leaves the priest in the same position as all other priests who are without employment. Suspension is a judicial act based on something which calls for such sentence. A sentence of suspension follows a trial for an offense, from which the priest may appeal, but for a removal the priest may have recourse to the Bishop's superior. To confound removal with suspension, acts so different in character, is to lay the groundwork for misapplication of certain laws of the church, and also for the false conclusion that the Bishop has no power of removal for grave cause unless there first be a trial for some ecclesiastical offense.

When a priest is accused of an offense for which he may be convicted and punished, he is entitled to a trial according to the laws of the church before he can be sentenced. But the

law relating to such case throws no light on the question of the Bishop's power of removal. Nor do the laws respecting parish priests in Catholic countries control enactments made for the government of Bishops and priests in this country. It is true, as the plaintiff contends, and for which he cites Dr. Smith's Elements of Ecclesiastical Law, page 381, that pastors in the United States should not be dismissed from parishes, *ratione criminis*, save on regular trial, and no priest accused of an offense shall be punished save on regular trial. This has no bearing on the question of the Bishop's power of removal at his discretion. As quoted in the plaintiff's own testimony, the same author, page 170, paragraph 401, says: "Ecclesiastics, who are movable at the will of the Bishop, may be, even against their will, dismissed without such trial or sentence." And page 178, paragraph 478: "The following ecclesiastical office-holders, chiefly, are movable at the nod of the Bishop—at the Bishop's will: * * * all pastors in this country save one, perhaps, in New Orleans." And page 179: "Again Bishops in this country do not as a rule remove pastors without sufficient reasons. Hence, in case a pastor is removed *sine causa*, without at the time being placed over another congregation of equal importance, he may have recourse to the superior for redress, since such removal would seem to be not only illicit but invalid." The author treats a dismissal, *ratione criminis*, as a very different thing from a removal for grave reasons by the Bishop at his will.

Aside from the written law the evidence is strong that it has been the usage for Bishops to appoint and remove pastors, from the planting of the church in the colonies to the present time. Though often the power has been doubted, contests by priests in the civil courts, on the ground of illegality, have been very few. It is not alleged that such removal has been declared unlawful previous to the litigation between these parties. In a recent case, one of the conceded facts, was this: "By the usage of the Roman Catholic Church in New England * * * the Bishop appoints the priests to the several parishes in his Diocese and removes them at his pleasure." *Hennessey et al. v. Walsh et al.*, 15 *American Law Register*, 264. However clear the Bishop's power to remove a priest at his pleasure may appear in the unwritten law, we shall not dwell thereon, for the written is conclusive of the question.

That portion of the charge which constitutes the 13th specification of error, taken by itself, perhaps is erroneous, but not with the context. It is in the midst of instructions respecting the

rights, duties and obligations of the plaintiff and defendant under the laws of their church wherein the court rules that the defendant had no right to remove the plaintiff from any malevolent or capricious spirit, or without a reasonable cause. And though it is said that the priest got his office from, and holds it subject to the will of the Bishop, and does not own it as other property, it is also said that both were bound to know the laws and established usages of the church which regulate their conduct in their respective offices, and govern their official relations with each other.

The plaintiff urges that the removal so injured him in the property of his profession that if not contrary to the laws of the church, it is to the supreme law of the land. His profession is that of a priest in the church. He acquired it by compact. He holds it under a promise to obey the laws of the church and the proper orders of the Bishop. Were his contract void for its immorality or illegality, he could recover nothing for its breach. If illegal he is neither entitled to restoration nor to damages for his removal. If legal, and his removal was authorized by the terms of the compact, no law of the land is violated. In this country the church is completely separate from the State. Every church association is voluntary on the part of its members and the terms and conditions depend entirely on its own rules. The profession of priest or minister in any denomination is taken subject to its laws. These he agrees to obey. If they become distasteful to him he can withdraw—no power can compel him to remain and perform his priestly functions; but if he violates the laws of his church, or disobeys the lawful commands made in accord with his compact, the civil courts will not maintain his footing in the church. If the plaintiff was removed in accord with the law of the church, he has no cause of complaint. If such laws provide that the Bishop may remove a priest without trial, he has no right to a trial, and if they provide he shall have recourse to the Bishop's superior in case of unlawful removal, his remedy is by such recourse, for this is his contract.

The late Judge REDFIELD, in a note to *Hennessey v. Walsh*, *supra*, says: "Some principles are well settled by repeated decisions of the court with slight or no conflict. First, the decisions of ecclesiastical courts having by rules or laws of the bodies to which they belong, jurisdiction of such questions, or the right to decide them, will be held conclusive in all courts of the civil administration, and no question involved in such decisions will be revised or reviewed in the civil courts, except those per-

taining to the jurisdiction of such courts, or the officers to determine such questions, according to the law or usage of the bodies which they represent. Second, it is a universal rule of law, applicable not only to this subject, but to all subjects connected with legal administration, that one who becomes a member of any church or other society, thereby consents to be governed by the rules or laws of such organization, and that he cannot justly claim to have suffered wrong or injury by the enforcement of such rules upon himself and his property, upon the maxim *volentia non fit injuria*. And this maxim applies to cases where the party voluntarily places himself in the position ultimately to have an act done affecting his interests, or done at the will of another, as if he subjected himself directly and immediately to the act, upon the principle that one who puts the slowest agencies at work which are sure in the end to produce a given result, is as truly the author of the ultimate result as if produced by ever so immediate and direct causes. Third, that courts will not interfere with the internal police and discipline of churches, or other voluntary societies, so long as they keep within the reasonable application of their own rules, which were known to the members, or might have been learned by them upon reasonable inquiry at the time of connecting themselves with the society or church."

The foregoing clearly stated principles repel the conclusion that the plaintiff's removal, if in accord with the law of the church, was contrary to the law of the land. They also show that the civil courts will not interfere where the ecclesiastical courts or officers have jurisdiction and have acted under their own rules giving them a reasonable application. At the time the plaintiff was ordained the law of the church was the same as it is now; no right has been taken away or duty imposed by subsequent legislation. He knew then, if appointed to a mission, he was subject to removal, and the high authority quoted in his testimony says that if wrongfully removed he may have recourse to the superior for redress. He sought no redress under the law of his church, but at once resorted to the civil courts. Without saying that the court below erred in his favor—this question is not raised in the record—he was allowed the utmost latitude consistent with the religious liberty of the church. The Catholic priest is as much bound by the law of that church as is any Protestant preacher by the law of his. A principle which would authorize the civil courts to interfere with the pastoral relations, or with the operation of church laws, or with

the discipline of members in one religious organization, would also in all others. The church should be free to deal with its members, officers and ministers according to its laws and usages. It would be a grievous wrong to the church to rule that its priests and ministers are exempt from its proper discipline and authority because of their profession. They have no property in such profession that is shielded from the consequences of their broken vows and compacts. They neither acquire nor hold it as they do lands or chattels.

From what has already been said with reference to other points, it follows that the court was right in ruling that, "To enable the plaintiff to recover the jury must be satisfied from the evidence that the plaintiff was wrongfully and unlawfully removed from his charge." Acting in the office of Bishop, making a removal under the laws of the church, it will not be presumed that it was wrongfully made by the defendant.

The next matter to consider is the effect of the letter of November 5, 1871, by the defendant to the plaintiff, as follows:

"Reverend Sir: Your administration of the affairs connected with the Church of the Annunciation has been such that I feel myself compelled to remove you, and leave the church vacant. And I now forbid you to exercise any priestly function in Williamsport, even to say mass. This prohibition binds *sub gravi*. You may call on me at Scranton and I will inform you of my further intentions in your regard."

The plaintiff says: "The real question, admitting for the argument, that it was not *res judicata*, was the legal effect of the letter. Did it make such accusations against the plaintiff as gave him the right to have these vague accusations defined and tried upon full notice and hearing and opportunity of defense?" All through the trial, and in the points he submitted, the plaintiff claimed it was the province of the court to construe or interpret the letter, and we are of the opinion that the interpretation was correct. Little will be added to the remarks of the learned judge of the Common Pleas. In reading the letter the law of the church, respecting removal, should be kept in view. Removal should not be made but for grave and sufficient reasons. If the Bishop cannot refer to unskillful or careless management of the affairs of the church, or other faults which mar the priest's usefulness in the congregation, without being held to the making of a criminal accusation, it were vain to enact that he may remove him, and to admonish that he do not remove without grave cause. The language of the letter implies bad administration

of the affairs of the church. This is a grave cause, and could arise from one or more of many defects in the priest not constituting an ecclesiastical offense. Sufficient reason may exist, calling for removal, where there is none for accusation and trial, or for suspension. In plain terms, the plaintiff was removed and forbidden to exercise any priestly functions in Williamsport. This prohibition did not extend elsewhere, and the simplest rule of interpretation limits its application to the place that is named, leaving him in possession of his priestly faculties, with liberty to exercise them in other places, in like manner as any other unemployed priest. The church was located in Williamsport, and embraced the English speaking or "non-German Catholics" of Williamsport—the only other Catholic Church in that place being the German—and the prohibition was complete as to Williamsport. To have made it less extensive would have left an open door for its evasion.

The words "*sub gravi*" relate to the prohibition, and if they mean all that the plaintiff says they do, he would suffer nothing because of them so long as he should keep the promise made at his ordination. It was unnecessary to assign a cause for his removal; the letter contains no accusation of crime or moral fault, yet states the grave reason. But if the words admit equally well of two constructions, one in accord with the lawfulness of the accompanying act, and the other opposed, they shall be taken in the sense which so accords; for it will not be presumed that a man intends to give a bad reason for a lawful act, vitiating the act itself.

Moreover, if on the face of the letter there be room for doubt, it may be read in the light of the understanding of the parties at the time. Within four days thereafter, the plaintiff called on the defendant at Scranton, and from there wrote to Rev. J. Koeper, pastor of the German Catholic Church in Williamsport: "The Bishop says he will give me a mission of good income and free of debt. He thinks, very properly, that I do not relish the idea of paying off debts, or engaging myself with brick and mortar. * * * He holds to his intention of punishing the Irish congregation of Williamsport; says he will not send a priest there for some time. On reflection, I think this course may prove beneficial. I intend going to Friendsville with Slattery for Sunday and preaching for the natives." This is convincing that the plaintiff knew he was simply removed, and that he still possessed his priestly faculties with liberty of exercising them outside of Williamsport wherever invited. He thought it might prove beneficial to punish the Irish congregation, and concedes that he did

not relish paying off debts or engaging with brick and mortar. He was promised, and was willing to accept, another mission. Although smarting under his removal, he then felt no sting of an accusation for an alleged offense, nor did he claim a trial, nor did he think the removal unlawful based on the ground that he so disrelished paying debts that he had not well administered the affairs of the church. His own testimony reveals that he afterwards refused a mission because he thought it not good enough, and then it entered his mind to contest the removal, not by recourse to the Bishop's superior, but in the civil courts.

On the day of the removal the Bishop wrote to Reverend Koeper directing him what to do with the property of the Church of the Annunciation, and what to do for the sick, but saying nothing of the plaintiff. The entire letter concerns the property and congregation, and the words, "severe course," refer to the treatment of the congregation, which, on reflection, the plaintiff thought might prove beneficial. Even if those words could be construed as also applying to the removal of the plaintiff, it would not change the nature of the act. The discipline could be severe without punishment in any sense other than is necessarily included in the removal of a priest against his will.

The assignments of error relating to the instructions respecting the several letters, cannot be sustained, nor can those resting on objections to testimony on the ground that the interpretation of the letter of removal was for the court. At the plaintiff's request the court did interpret the letter, and the admission of the said testimony could not have affected the questions submitted to the jury.

We discover no error in the submission of facts on the question of reasonable cause for removal. Nor as to what were the rules of the church respecting the keeping and rendering of accounts by the priest to the Bishop. There was evidence of rules relating to accounts. Without stating the rules the court charged: "The only question is, are they required to be kept? If they are, then a failure to perform them is a neglect of duty; and a refusal to perform them, after request by the Bishop, is a wilful dereliction of duty." If more specific instructions concerning the rules were desired, they should have been requested. There is no unwarranted assumption of facts in the clauses of the charge set out in the sixteenth, seventeenth and eighteenth assignments, if said clauses be properly read with the context.

The jury having found that the plaintiff was not entitled to recover, and as the case does not

go back for trial, the instructions respecting damages need not be remarked.

The remaining assignment that will be noted is to the ruling that the proceeding in equity decides nothing except the question of costs. The decree of the court below in that case was first, that the removal of the plaintiff as pastor of the Church of Annunciation was unlawful; second, that the prohibition to the plaintiff to exercise any priestly function in Williamsport was unlawful, and third, that the defendant pay the costs, except complainant's bill. This singular decree declared the defendant's act unlawful, yet gave the plaintiff no redress, the result being that each party paid a fraction of the costs. Had the bill been dismissed without prejudice, and the costs divided between the parties, the decree would have been less novel; but more in accord with the practice in Pennsylvania. It is fairly said that the opinion of this court as filed is in affirmance of that decree; and it having been so considered at the time by two of the five judges who heard the case, they dissented. A motion was made for a reargument which was refused on the ground that nothing was decided but the question of costs, the Chief Justice filing an opinion concluding thus: "In concurring in a decree of affirmance all that I meant to decide, and all that I think was meant to be decided, was that under the special circumstances of the case the judge below exercised a sound discretion when he refused to impose all the costs on the appellee." He did not understand that to settle anything as to the powers and rights of the Bishop over the priest: *O'Hara v. Stack*, 9 Norris, 492. Hence but two of the judges concurred in the opinion, or in affirming anything but the disposition of the costs, and the court was clearly right in treating the case as if the bill had been dismissed without prejudice. That was the substantial act, though not the formal, of this court in the final disposition of the case on the motion for reargument.

Judgment affirmed.

Mr. Justice MERCUR files a dissenting opinion, in which Mr. Justice GORDON concurs.

◆ ◆ ◆
MOORE v. COXE et ux.

A search warrant for stolen articles, describing them as "jewelry and other personal effects" is a sufficient compliance with Art. I, Sec. 8, of the Constitution of Pennsylvania, requiring that no search warrant shall issue, unless the goods are described as near as may be. The provision of the fourth Amendment of the Constitution of the United States, requiring greater particularity of description, relates only to Federal legislation or process.

Error to the Court of Common Pleas, No. 3, of Philadelphia county.

Trespass *vi et armis*, by Edward Moore against Edwin T. Cox and wife, to recover damages for a trespass of the said wife, committed in assisting to make a search for stolen goods upon plaintiff's premises without a sufficient search warrant. Plea, not guilty. The testimony on behalf of the plaintiff showed that on March 22, 1879, two policemen appeared at plaintiff's residence and produced a search warrant. The warrant, which was put in evidence, described the goods to be searched for only as a "quantity of jewelry and other personal effects, lately by some one feloniously taken, stolen," etc. The policemen said that they would wait for Mrs. Cox, and she made her appearance in a few minutes thereafter, when, the warrant having been read, they proceeded to search the house, Mrs. Cox accompanying them to identify the stolen goods, if any should be found.

Upon motion of defendant's counsel, the court entered a compulsory nonsuit, and subsequently refused to take off the same.

Plaintiff took this writ, assigning for error the entry of the judgment of nonsuit and the refusal to take off the same.

For plaintiff in error, *F. F. Brightly, Esq.*

Contra, J. D. Yocum, Esq.

PER CURIAM. Filed January 17, 1881.

We see no ground upon which the search warrant produced as the justification of the officers can be pronounced invalid. The Constitution of this State, Article I, Section 8, declares that no search warrant shall issue for things "without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant." This does not render necessary such a particular description as is required in Article IV of the Amendments to the Constitution of the United States, for those amendments only apply to Federal legislation or process. In the Constitution of this State all that is provided is that the things searched for should be described *as near as may be*. We cannot say that the description in the warrant in evidence is so insufficient as to render the process void. *Sandford v. Nichols*, 13 Mass., 286, was decided under the Amendment to the Constitution of the United States, having been a warrant issued to seize goods which had been labelled and condemned in the District Court of the United States for a violation of the embargo laws. In the case before us, "jewelry and personal effects" sufficiently indicated the general character of the goods sought for.

Judgment affirmed.

ANDREW HUNTER, Defendant Below, v. CONRAD MOUL.

The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. One not a party to a note, but who has caused it to be drawn or indorsed or delivered over to a third person as a security, or has guaranteed the payment, is not entitled to notice of dishonor of it, but in an action on the original liability he may show in defense any injury he has actually sustained by the laches of the transferee. The fact that the collaterals were changed for other securities which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange.

Girard Fire and Marine Insurance Company v. Marr, 10 Wright, 304, approved and followed.

A creditor has a right to retain all unpaid securities until he obtains satisfaction of the debt due him.

Error to the Court of Common Pleas of York county.

Opinion by MERCUR, J. Filed October 3, 1881.

This judgment was entered on the report of a referee. The important facts found by him are substantially these: Hunter was indebted on book account to Moul in the sum of some eleven or twelve hundred dollars. On being asked for payment, he replied he had no money, but had the promise of a note of \$900 from Camp & Randell, payable in four months, and that he would give that to Moul to get discounted and use the money. The latter answered that he did not want the note, but that Hunter should get it discounted and give him the money. To this Hunter replied he was a stranger, and could not get it discounted, but that Moul should take the note and get it discounted, and he, Hunter, would stand for it and see it was paid. Moul assented to this. The note was made payable to him and sent to him. It was not indorsed by Hunter. Moul had it discounted at bank and received the proceeds. When it matured it was protested for non-payment and taken up by the defendant in error. In lieu thereof, and soon thereafter, he took from Camp & Randell their two drafts of \$450 each, payable at twenty and thirty days respectively, and wrote Hunter informing him of the fact, but received no answer. The draft first falling due was paid at maturity, the other was protested for non-payment, and Moul wrote Hunter informing him thereof. This draft remained in the hands of the defendant in error. Treating it as no payment, he seeks to recover of the plaintiff in error, on the original account, a sum equal to the amount of the draft.

The contention is whether the circumstances under which the defendant in error took the

note, or his subsequent action in relation thereto, compelled him to apply it as a payment on the account against the plaintiff in error. There was no express agreement to accept the note as payment, nor to give time for the payment of the account. The referee found the note was not taken by the defendant in error, as absolute payment of so much of the indebtedness of the plaintiff in error, and technically not as collateral security therefor, but inasmuch as paper so held has been called collateral by the courts, he treats it as such. He further found the defendant was guilty of no negligence in failing to collect the note, and that he did not so convert it to his own use as to bar his right to recover of the plaintiff in error.

The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred: *Leas et al. v. James*, 10 S. & R., 307; *Maginn v. Holmes*, 2 Watts, 121; *Weakly v. Bell et al.*, 9 Id., 273; *M'Intyre v. Kennedy et al.*, 5 Casey, 448; *Brown et al. v. Scott*, 1 P. F. S., 357; *Logue v. Waring & Company*, 4 Norris, 244.

When the transfer of a note is a conditional payment, it is necessary to inquire what the true condition was, and if not fulfilled by the person accepting it, what injury, if any, has resulted from the breach. The cases are not in harmony, as to the effect of a failure to present the note of a third person and give notice of its dishonor when no injury therefrom has resulted to the debtor. We shall not attempt to review them, but refer to some which we think correctly rule this case. Great regard must be had to the character of the transaction. If the debtor indorse the note, a more stringent rule prevails as to notice than if he transferred it by delivery only. When the guarantee is absolute, that a specific act shall be done by another, it was said in *Vinal v. Richardson*, 13 Allen, 521, demand and notice need not be averred, although the want of them may be a defense on the ground of negligence to the extent of the resulting injury. One who has merely guaranteed it, but whose name is not on the bill or note, is not in general entitled to notice of non-payment. *Chitty on Bills*, 498. So on page 441, it is further said in general if the bill or note be given as collateral security and the party delivering it were no party to it, either by indorsing or transferring it by delivery when payable to bearer, but merely caused it to be drawn or indorsed or delivered

over by a third person as a security, or has merely guaranteed the payment, it has been considered that he is not within the custom of merchants an indorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liabilities by the neglect of the holder to give him such notice unless he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission. The reason is, when a person delivers over a bill to another without indorsing it, he does not subject himself to the obligations of the law merchant, and cannot be sued on the bill. As he does not subject himself to the obligation he is not entitled to the advantages. If he can prove he has sustained damages, then he is discharged only to the extent of such actual damages. *Id.* The guarantor of a note does not stand in the same situation as parties to it. His obligation is in the nature of an insurance of the debt, and there is no need of the same proof to charge him as if he was an indorser. The necessity of demand in order to charge the indorser of a bill is solely grounded on the custom of merchants, and applies only to actions against the indorser on the bill itself. It does not apply when the guarantor is not an indorser: *Gibbs v. Cannon*, 9 S. & R., 201; *Overton v. Treacy*, 14 S. & R., 311; *M' Lughan v. Bovard*, 4 Watts, 308. The law is clearly stated in 2d Parsons on Bills, 184, where it is said if paper be transferred by delivery only as security for a pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. The original liability remains what it was, and upon dishonor of the paper, it is not even necessary to give him notice thereof as an indorser, but the debtor may show in defense any injury he has sustained by the actual laches of the creditor. Nor does the fact that the collaterals were exchanged for other securities which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange: *Girard Fire and Marine Insurance Co. v. Marr*, 10 Wright, 504.

The name of the plaintiff in error was neither in or on the note. It was not payable to bearer. He was in no sense a party to it. With a view that the proceeds when paid should discharge an amount of his indebtedness equal thereto, he caused it to be made payable to his creditor and put it into his hands. Through no fault of that creditor it was not paid. It is not shown that it could, at any time, have been collected of the makers. The acceptance from the makers of their two drafts was no payment, but did result in the payment of one-half the amount. Having

sustained no loss or damage by any act of his creditor, the plaintiff in error has no just cause of complaint at being still held liable for his indebtedness. The creditor was not obliged to give up the unpaid draft before bringing this suit. It is not shown to be of any value, but if valuable he has a right to retain all the securities in his hands until he obtains satisfaction of the debt due him.

Judgment affirmed.

◆◆◆
HOME INSURANCE COMPANY, Defendant
Below, v. TIGHE.

When an insurance company, after due notice, effect a cancellation of the policy, in order to extinguish the liability of the company for the insurance actual payment of the sum to be refunded must be made.

When a due bill or certificate of indebtedness is given for the return premium it is properly left to the jury to decide whether such instrument is accepted as payment or only as an evidence of indebtedness.

Error to the Court of Common Pleas of Wayne county.

Mary Tighe, an illiterate woman, insured her house with the Home Insurance Company. The company, through its agent, undertook to cancel the insurance. Due notice was given and Mary Tighe met the agent and signed a cancellation of the policy. The agent then handed her a kind of due bill or certificate of indebtedness on the part of the company for the portion of the premium returnable to her. The court below left it to the jury to find whether Mary Tighe had accepted the due bill as an actual payment, or as only an evidence of debt.

Opinion by MERCUR, J. Filed May 2, 1881.

The company had a right at its option to terminate the insurance at any time, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. The company gave the necessary notice, and the insured delivered the policy to the agent of the company without his paying her any money for the unexpired portion of the term. He gave to her a writing called by him a due bill, stating the sum due her. The main contention is whether she accepted that in payment. If she did not then she was not repaid, and the insurance was in force at the time of the loss. It is claimed on her part that she did not voluntarily and understandingly surrender her policy. The first assignment is that the court erred in submitting that question to the jury without evidence. She died before the trial and her evidence is not in the case. It is contended, however, that the evidence given by the plaintiff in error was sufficient to justify the submission.

The evidence of the agent of the company does fairly indicate that he drew and had her sign

the cancellation of the policy before he said anything to her indicating that he would not pay her the refunding money at the time. She had a right to exact the payment, and may reasonably have supposed she was then to be paid. When he handed her the due bill, and explained in regard to its payment, she made no reply. As bearing on the presumption that she did not understandingly surrender her insurance without the payment of any money the character of the paper given must be considered. He calls it a due bill, but it is more like a certificate of indebtedness. It is a writing signed "E. Killam, agent," declaring there is due Mary Tighe from the Home Insurance Company of New York, the sum of \$10.66, the return premium on policy No. 558."

Thus the agent states the fact that the sum specified is due, not from him, but from the company. If thus authorized by the company it created an implied promise to pay it, but the time when is not stated. On its face it would be demandable at once. The agent says, he was to pay it over after he received it from the company. When that would probably be he did not state. The law would imply it should be in a reasonable time. It could hardly be expected that she was obliged to go to New York to demand payment. In view of the fact that she was entitled to the money at the time she handed over the policy it was proper to consider whether she could have understood it was to be withheld from her for an indefinite time in the future. The fire occurred thirteen days after the evidence of indebtedness was given, yet the money was not paid. Is it reasonable to assume that she understood there would be, or assented to, such delay? The length of time required for communicating between New York and Hawley is about five hours. Under all the circumstances shown in regard to the transaction we think there was enough to justify the submission of these facts to the jury. Whether Mrs. Tighe did in fact accept the due bill in payment was properly submitted to the jury. A clear distinction exists between taking it as a payment or as an admission of indebtedness. To extinguish the liability of the company for the insurance actual payment of the sum to be refunded must be made: *Hathorn v. Germania Insurance Co.*, 55 Barb., 28; *Van Valkenberg v. Lennox Fire Insurance Co.*, 51 N. Y., 465; *Etna Insurance Co. v. Maguire*, 51 Illinois, 242; *Holden v. Putnam Fire Insurance Co.*, 46 N. Y., 1. It is unnecessary to discuss the other assignments in detail as what we have said sufficiently covers them. We discover no error therein. *Judgment affirmed.*

Circuit Court, United States.

Western District of Pennsylvania.

IN EQUITY.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. THE NEW YORK, CHICAGO & ST. LOUIS RAILWAY CO.

1. Real estate acquired by a railroad corporation by purchase or condemnation and held for the necessary enjoyment of its essential franchises, cannot be taken from it by another railroad corporation by the usual method of appropriation.
2. But the extent of such acquisition is not conclusively determinable by the directors of the first corporation; and where another corporation seeks to make such appropriation, it is a proper subject of judicial inquiry whether the real estate proposed to be taken is reasonably necessary to the first corporation.
3. In determining this question every reasonable intentment will be made in favor of the primary rights of the first corporation, and in measuring their extent there must be a liberal consideration of the future as well as the present necessities of the corporation.
4. But where at a preliminary hearing the affidavits do not fully disclose the necessities present and prospective of the first corporation, and the case is not free from doubt, a preliminary injunction will not be granted to restrain the second corporation from constructing its road overland of the first corporation, where the acts complained will not immediately interfere with the business or operations of the first corporation. In such case the court will not undertake to determine the rights of the parties until final hearing.

Sur motion for a preliminary injunction.

Opinion by ACHESON, D. J. Filed September 5, 1881.

At the late sitting of the Circuit Court at Erie, I heard and refused a motion for a preliminary injunction in this case. The importance of the controversy is such, however, that a reargument was allowed, and the case has been heard by the Circuit Judge and myself upon fuller proofs. Of these proofs, however, I may say, that they consist in the main of *ex parte* affidavits, and in some particulars are less full than is desirable. For example, they afford little information as to the extent of the business done at Harbor Creek Station. It is true, we have the opinions of respectable and intelligent witnesses as to the requirements of the plaintiff company at that point; but in matters of fact the affidavits are deficient.

In respect to the plaintiff's properties occupied, or proposed to be occupied, by the defendant at Twenty-Mile Creek, Sixteen-Mile Creek, the Brawley piece and the gravel pit, we have had no difficulty in reaching a conclusion adverse to the plaintiff's application.

As to the wood-yard at Moorhead's the case is not entirely clear. But as the answer and the affidavit of Mr. McGrath, the defendant's superintendent of construction, (as we understand

them), declare that the defendant does not intend to take up or remove either of the plaintiff's spur tracks at this place, or in any wise interfere with the plaintiff's use thereof, we think that the present proofs do not make out such a case as calls for a preliminary injunction. At the final hearing, with all the evidence regularly taken before us, we can more intelligently and safely determine the rights of the parties.

With some hesitation we announce a similar conclusion in respect to the land at Harbor Creek Station. I myself entertain serious doubt whether any portion of the plaintiff's land at this point is open to appropriation by the defendant. But for lack of complete information my mind has not reached a settled conviction. If the right of appropriation exists, it certainly ought to be exercised so as to avoid all unnecessary injury to the plaintiff. The defendant's line as located divides the plaintiff's property, cutting off a strip of forty-one feet in width along Boynton's line. If there is no engineering difficulty or other obstacle in the way the defendant had better consider whether it ought not to shift its location down to Boynton's line and thus leave the plaintiff additional available space south of its southerly track.

Upon the whole case as now presented, and after a careful consideration thereof, the court is of opinion that the motion for a preliminary injunction should be denied.

And it is so ordered.

Concurring opinion by McKENNAN, Cir. J.

The opinion of Judge ACHESON announces the decision of the court on the motion for a preliminary injunction in this case. The motion was argued before him alone at Erie, and was then denied, but as he assented to the request of counsel for a reargument, and desired me to be present at it, I consented to sit with him merely that I might render him, by conference and suggestion, such assistance as I could, leaving still with him the ultimate burden of responsible decision.

I concur with him in the denial of the motion, and in the reasons given for it.

It is undoubtedly true that real estate acquired by a railroad corporation, by purchase or condemnation, and held for the necessary enjoyment of its essential franchises cannot be taken from it by another corporation, by the usual method of appropriation. But I do not agree with the argument, that the extent of such acquisition is conclusively determinable by the directors of the corporation, and that the exercise of their power in this connection is

questionable only on the ground of bad faith, as the equivalent of fraud. The power of acquisition is limited by the necessary wants of the corporation, and an exercise of it beyond this limit is not within its protection. I see no reason then why this limitation of the power of a corporation to acquire and hold real estate is not as proper a subject of judicial inquiry, where alleged encroachments by another corporation is to be determined, as the existence of the power itself.

Upon the result of such an inquiry the decision of this case depends. In finally disposing of it, every reasonable intendment must be made in favor of the primary rights of the complainant. At the points of the alleged conflict, no actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent, there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business.

In view of these considerations, the suggestion of Judge ACHESON has great force, that it might be most prudent on the part of the respondent to modify its location at Moorheads and Harbor Creek.

—Laws of the General Assembly of the State of Pennsylvania, passed at the session of 1881. With compliments of S. A. Losch, Esq.

—*The American Law Review*, for October, contains an article by R. C. McMurtrie, Esq., on "Recission of Divisible Contracts; one by E. B. Callender, Esq., on "Torts of Hospitals," and one by Thomas W. Peirce, Esq., on "Implied Warranties on Sales." The publishers, Messrs. Little, Brown & Co., announce that an advance budget of the *American Law Review* will be published in a few days containing the following articles: "Challenge to the Array." By Hon. Seymour D. Thompson, Judge of the St. Louis Court of Appeals, St. Louis, Mo. "Insanity as a Defense." By Edward B. Hill, Assistant United States Attorney, New York, N. Y. "Jurisdiction in Guiteau's Case." By J. H. Robinson, Assistant Solicitor of the Treasury, Washington, D. C. "Another View of the Jurisdiction in Guiteau's Case." By Robert D. Smith, Boston, Mass. "Opinions of Jurors. Disqualification for Opinion or Bias." By Edwin G. Merriam, St. Louis, Mo. "Confessions of Prisoners." By Charles R. Darling, Boston, Mass. General Notes by the Editor. The price will be 50 cents.

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PITTSBURGH, PA., OCTOBER 19, 1881.

Supreme Court, Penn'a.

EDMUND DALE, Trustee, Plaintiff Below, v.
 BENJAMIN KNAPP.

The support of religious societies is a charity in a broad Catholic sense, and whatever is morally fit and proper to be done on Sunday in furtherance of the great object, is likewise a charity.

A subscription made on Sunday towards the erection of a church, is a well recognized charitable work of active goodness. It is not prohibited by the Act of 22d April, 1794, and an action will lie to enforce payment of such subscription.

Error to the Court of Common Pleas of Clearfield county.

Opinion by MERCUR, J. Filed October 3, 1881.

This contention is whether a subscription made on Sunday toward the erection of a church edifice is void.

A contract made on Sunday is not void at common law: *Kepner v. Keefer*, 6 Watts, 231; *Fox v. Mensch*, 3 W. & S., 446; *Shuman v. Shuman*, 3 Casey, 90. If then this contract is void it is by reason of the Act of 22d of April, 1794. That act declares: "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted," and such other exceptions as are mentioned in the proviso, every person so offending shall be subject to a penalty as in the act prescribed.

It may be conceded that the making of this subscription is not a work necessarily done on Sunday. The question then is whether the raising of money to build a house of worship is a work of charity within the meaning of the act, or is the solicitation of contributions for that purpose from a congregation assembled on Sunday for religious worship, a work of charity?

No man can legally be compelled to contribute towards the erection of a house for public worship, nor to attend or support religious services therein. The statute imposes no such obligation. It, however, does recognize Sunday as the proper day for public worship. It leaves every one free to use the day for that purpose or refrain from such use. It is designed to compel a cessation of all those employments which will interfere with or interrupt the exercise of re-

ligious services, either public or private, on that day. The right to so worship is protected by its penal enactments. Each person has an indefeasible right to worship Almighty God according to the dictates of his own conscience. Each is at liberty to use Sunday for the purpose contemplated by the statute. If he refrains therefrom, he shall not so use the day as to annoy others who may be engaged in religious worship: *Johnson v. Commonwealth*, 10 Harris, 102. The purpose of the law is to protect the day for the comfort of those conducting or attending religious worship. Charity is active goodness. The means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion are not forbidden, and may be deemed works of charity within the meaning of the statute. It is not essential that they be purely charitable. It is sufficient if they so far partake of that character as to be recognized by the congregation as a part of its active goodness, and are not expressly forbidden by the statute: *Commonwealth v. Nesbit*, 10 Casey, 398.

The inclination of this court has long been not to permit a person to set up this law against another person from whom he has received a meritorious consideration or on whom he has inflicted an injury. It was therefore said in *Mohney v. Cook*, 2 Casey, 342, that the law relating to the observance of the Sabbath defines a duty of the citizen to the State and to the State only. It was there held, that one who had erected an obstruction in a navigable stream whereby the boat and cargo of another were wrecked on Sunday, could not, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in navigating his boat on that day. So it was held the hiring of a carriage on Sunday by a son to visit his father created a legal contract, although no reason was shown for visiting him on that day, other than flows from a general filial duty and affection: *Long v. Mathews*, 6 Barr, 417. It is not a violation of the act for a hired domestic servant to drive his employer's family to church on Sunday in the employer's private carriage: *Commonwealth v. Nesbit*, *supra*. A will executed on Sunday is not void, although at the time the testator be in his usual state of good health and live five or six months thereafter: *Beitman's Appeal*, 5 P. F. Smith, 183.

Contracts for services on Sunday of the preacher, the sexton, the organist and the singers are not illegal, although these persons may engage in such employment as a means of livelihood. Their services are in furtherance of the same great charity.

The custom of soliciting contributions on Sunday from congregations assembled for religious worship, is very general, and has existed from an early period of time. With some denominations it may be for a greater variety of objects than with others. Sabbath offerings may be for the incidental expenses of the church; to light and warm the house; to pay the organist and the sexton; to assist the poor; to repair, enlarge and rebuild the church edifice; to support foreign and domestic mission. The latter often extends to furnishing aid to poorer congregations towards erecting houses of worship. If it be illegal to give or agree to give for such objects on Sunday, it must be illegal to solicit the giving. We are not aware it has ever been held that the preacher became liable to the penal provisions of the statute by soliciting from the pulpit such contributions, nor any of the officers of the church for taking up the collection. Whether the sum be large or small does not change the principle applicable to the transaction. It is true there is a legal distinction between having given and agreeing to give, yet inasmuch as we think a subscription towards the erection of a house of public worship is a work of charity, such agreement is not prohibited by the Act of 22d of April, 1794. The conclusion at which we have arrived is not in accord with the doctrine assumed in *Catlett v. The Trustees, etc.*, 62 Indiana, 365, but in principle it is in harmony with the rule declared in *Flagg v. Millburg*, 4 Cushing, 243; *Bennett v. Brooks*, 9 Allen, 118; *Doyle v. Lynn et al.*, 118 Mass., 195, and directly sustained in *Allen v. Duffy*, decided last year by the Supreme Court of Michigan, and reported in 9th volume of the Reports, 646.

The support of religious societies is a charity. It is a giving for the love of God, or the love of a neighbor in a broad Catholic sense. Whatever is morally fit and proper to be done on Sunday in furtherance of the great object, is likewise a charity. The learned judge, therefore, erred in ordering a nonsuit and in refusing to take it off.

Judgment reversed and procedendo awarded.

MILLIGAN'S APPEAL.

The proof to surcharge an accountant, who is practically charged with embezzling \$1,500 of the bonds of decedent, should be such as would satisfy a jury that she had stolen the same.

Appeal from the Orphans' Court of Northampton county.

Opinion by PAXSON, J. Filed May 2, 1881.

We are called upon in this case to review the rulings of the auditor and the court below upon questions of fact. The principal matter of contention was the surcharge of the accountant with

\$1,500 United States bonds, and with the coupons and interest thereon. These bonds were shown to have belonged to and been in the possession of the testatrix prior to her death. The auditor, upon what he regarded as sufficient evidence, surcharged the accountant with said bonds, as will appear from the following extract from his report: "Upon the whole testimony in the case, the conduct of the accountant and the circumstantial proof adduced before the auditor, it is a moral certainty that the accountant either has these bonds or their proceeds, and under all the facts in this case, your auditor is clearly of that opinion, and accordingly so finds." The learned judge of the Orphans' Court sustained this ruling; yet it is evident he felt the strain of this branch of the case when he said: "While we are of opinion that the finding of the auditor is fairly sustained by the evidence, we are free to say, that the circumstances are not very strong, and are of such a character as might fail to produce conviction in other minds."

There was no direct evidence before the auditor that the accountant had either the bonds or the proceeds. The conclusion at which the auditor arrived was based wholly upon circumstantial evidence. It is not a question whether he has found the facts correctly, but whether his inferences from facts, which, in the main, are not disputed, were accurately drawn.

Much that was said about the accountant being the agent of the testatrix may be dismissed with the single remark, that she was not liable to account *qua* agent; she had no such possession of the bonds as agent as would render her liable for their non-production. As a matter of fact, and as a matter of law, the bonds were in the possession of the testatrix down to the time of her death, nor was the accountant her agent in the sense of involving liability. She was the servant and nurse of the testatrix, and did what she was directed to do; sometimes it was to collect a coupon, at others to nurse her mistress and to attend to household duties.

The only ground upon which this surcharge can be sustained is, that the accountant embezzled or stole the bonds. This is a serious charge. It ought not to be made lightly, nor without clear evidence to sustain it. When a person is charged with crime, it matters little what the form of the charge may be, or on which side of the court. It is true, the result is different; but the difference is only in degree. It may be more agreeable to be branded as a thief in the Orphans' Court or Common Pleas than in the Quarter Sessions; wherever the charge is made its gravity requires a careful consideration of the evidence upon which it is founded.

We have examined the auditor's report and all the testimony in the case with care, and are of opinion that the facts and circumstances from which the auditor draws his opinion are too weak and inconclusive to justify his inferences. Beyond the admitted fact of the opportunity to purloin the bonds there is not a scintilla of proof that the accountant took them, and the presumption, if there be one, arising from the mere opportunity is weakened if not destroyed, by the fact that others had opportunities of stealing the bonds, and the testatrix of giving them away or otherwise disposing of them.

It appears reasonably certain that, in February, 1869, the testatrix had \$4,000 in United States bonds, which were kept in a tin box; at that time they were exhibited by the accountant to counsel under circumstances not material to relate. We have no trace of them subsequently until sometime in 1872, when Mary R. Dodd testifies, the accountant showed them to her at the house of the testatrix, and informed her that there were \$1,700 of them. The witness saw the bonds, but did not examine them, and had no knowledge of the amount beyond what the accountant told her. The testatrix died during that year and after her death the accountant, who was her executrix, produced \$1,700 of the bonds as all that were remaining. When asked as to what had become of the residue, she accounted for \$300 as having been used to pay a subscription to a church. This was shown to have been correct, and was allowed. She further claimed that the testatrix had given her a \$500 bond for her services as nurse, which the evidence shows were faithful, laborious and of long continuance. This was allowed. The whereabouts of the balance of the bonds she did not attempt to explain. There was still a deficiency of \$1,500, and with this the auditor surcharged her.

Conceding there to be circumstances of suspicion surrounding the case, there is not enough to sustain the verdict of a jury against the accountant on either the civil or criminal side of the court. It would be dangerous to infer guilt from the mere opportunity to commit a crime.

The first, second and third assignments of error are sustained. We are unable to see any serious error in the remaining assignments. The principal one is to the refusal of the court to allow the accountant commissions. After reflection, we have concluded not to disturb the ruling. While we have relieved the accountant from the surcharge of the bonds, there is yet much in her conduct in the management of this estate that does not meet our approval. The ruling of the court below was not based exclu-

sively upon the bonds. There were other matters, such as the conversion of the bank stocks to her own use, the attempt to buy a portion of the real estate at her own sale, and the admitted use of the trust funds. These matters, coupled with her general conduct in her dealings with the estate, are sufficient to prevent our disturbing the ruling of the court below upon the question of commissions.

The decree is reversed, at the costs of the appellees, and it is ordered that distribution be made in accordance with the foregoing views.

For appellant, *B. F. Fackenthal, Esq.*

Contra, *W. S. Kirkpatrick, Esq.*

KELLY'S APPEAL.

A bill in equity set up a trust, fraud, spoliation of deeds, imposition upon a minor, and inability to bring a common law action. The question involved was a cloud on the title to certain real estate.

The defendants demurred to the bill on the ground that the plaintiffs had a full and adequate remedy at law.

Held, that a court of equity has jurisdiction to give relief in such circumstances. Every one of the subjects mentioned is a distinct head of equity jurisdiction, and courts of equity would be of little use if they were powerless to furnish redress to parties so situated and for such causes.

Error to the Court of Common Pleas of Schuylkill county.

Opinion by GREEN, J. Filed May 2, 1881.

This case comes before us on a demurrer to a bill in equity. The truth of the facts set forth in the bill being admitted the matter in controversy must be disposed of upon the assumption of the facts there stated. The bill alleges the purchase of a lot of ground by John C. Kelly in 1863, which was paid for with his own money, but the title to which was placed in his minor child, Joseph Kelly, who is one of the plaintiffs, in trust for his father. That the said John C. Kelly held the entire possession and control of the lot, and erected valuable improvements thereon, which were paid for exclusively with his own money, and continued in the occupancy of the premises to the time of his death in 1874. That when the minor, Joseph Kelly, came of age, his mother, Mary Kelly, denied to him the existence of any deed for the property, and at the instance and procurement of the defendants, destroyed the original deed to the said Joseph Kelly, for the purpose of defrauding the plaintiffs and preventing them from acquiring any interest in the property as heirs at law of their father. That in further prosecution of their design to defraud the plaintiffs the defendants procured the said Joseph Kelly, on the 13th day of September, 1879, the day after he attained his majority, to execute and deliver to his mother,

who was also his guardian, a deed for the premises, which was immediately placed on record. That the consideration upon which this last mentioned deed was procured to be made was the re-conveyance by Mary Kelly to Joseph Kelly of a one-fourth interest in the property, and a one-half interest in a certain store and business conducted by the said Mary Kelly, which the defendants knew at the time to be utterly worthless on account of her insolvency. That the defendants induced Joseph Kelly to withhold his deed from the record, and procured the said Mary Kelly on the same 13th day of September, 1879, to make a deed to Catharine Kelly, one of the defendants, without any consideration whatever, for the whole of the premises in question, which last mentioned deed was at once placed upon record. The allegations of the bill thus present a case in which a title to land was placed in one person to hold in trust for another, the subsequent spoliation of the deed of trust by the procurement of the defendants, the making of a deed by one who had been a minor on the day after attaining his majority, to his guardian, of the real estate of the ward, without any actual consideration, and upon withholding by the guardian from the ward of all knowledge of the true state of his title, the procurement by the defendants of a deed for the entire premises from the guardian of the minor to one of themselves without any consideration by means whereof they acquired the title of the ward to his own real estate, he receiving no benefit or consideration therefor. It is moreover alleged in the bill that several of the plaintiffs, including Joseph Kelly and the widow, are in the actual possession of the premises, and hence cannot bring an action of ejectment without going out of possession. Here are trust, fraud, spoliation of deed, imposition upon, and undue advantage taken of one who was a minor, immediately after obtaining his majority, and an inability to bring a common law action for the possession of the land in controversy. It is entirely unnecessary to discuss the question or cite authorities to prove that a court of equity has jurisdiction to give relief in such circumstances. Every one of the subjects mentioned is a distinct head of equity jurisdiction, and courts of equity would be of little use if they were powerless to furnish redress to parties so situated and for such causes. The bill in this case is in no sense an ejectment bill. The title set up is an equitable and not a legal title, and the parties who assert it are in possession of the disputed premises. Their title is clouded by the alleged fraudulent deeds which the defendants have put upon record, and to remove the cloud

the special function and larger powers of a court of chancery will be required. We are clearly of opinion that the bill in equity in this case should have been sustained and the defendants required to answer.

The decree of the court below dismissing the appellants' bill is reversed, etc.

For appellants, *Messrs. J. F. Minogue and G. R. & S. H. Kaercher.*

Contra, Messrs. D. B. Green, W. A. Marr and M. M. L'Velle

McGETTRICK'S APPEAL.

An auditor, under certain circumstances, has power to inquire into the validity of the deed.

The Orphans' Court has exclusive jurisdiction to distribute the estates of decedents among those entitled to the same.

The Orphans' Court has full and ample power to dispose of claims made against the estate of a decedent.

When the share of one is claimed by another, it must be established in the proceedings for distribution, and must also be there impugned.

A deed is not a judgment of a court; it is but an instrument *inter partes*, and has no higher authority than the parties can give it.

A deed is as liable to impeachment as any other form of contractual relation, and is necessarily subject to be invalidated wherever it is proffered to a tribunal as the basis of right.

Appeal from the decree of the Orphans' Court of Lancaster county.

Opinion by GREEN, J. Filed June 20, 1881.

In this case the proceeds of the sale, under an order of the Orphans' Court, of the real estate of an intestate, were in the hands of the trustee for distribution. One of the claimants to the fund was a niece of the intestate. Her share of the proceeds was claimed by the appellee, Robert Taylor, by virtue of a deed to him from the appellant for her interest in the lands sold. This deed was attacked as having been obtained fraudulently from the appellant and as being consequently void. The auditor held that he had no jurisdiction to inquire into the validity of the deed, and for that reason declined to consider the merits of the controversy, and awarded the share of the appellant to her grantee. On exceptions taken to this action of the auditor an application was made to the Orphans' Court for an issue to try the validity of the deed to Taylor, but the court refused the issue, holding that the appellant was bound by the action of the auditor and that the latter had decided adversely to her claim. We are of opinion that the auditor was mistaken in supposing he had no jurisdiction to inquire into the validity of the deed, and that the learned judge of the Orphans' Court was in error in dismissing the appellant's exceptions to the report of the auditor.

It is, of course, undisputed that the Orphans' Court has exclusive jurisdiction to distribute the estate of decedents among those entitled to them. Such distribution necessarily includes the power and the duty to ascertain the persons to whom distribution must be made. When the share of the one who is apparently entitled is claimed by another, such claim must be established in the proceeding for distribution, and as it must be there established, so it may be impugned. There is no occasion to resort to any other court or any other proceeding to determine the validity of the claim, as the Orphans' Court has full power and adequate procedure to dispose of the controversy. If a deed or other instrument is set up as a muniment of title for the interest of a distributee, an attack upon its validity is in no respect an impeachment of it in a collateral proceeding. A deed is not a proceeding nor the result of one. It is not a judgment of a court nor a decree of any species of tribunal. It is but an instrument *inter partes*, and has no higher sanction than can be given to it by the act of the parties. As such it must abide the tests of all voluntary contracts. It is, therefore, as liable to impeachment as any other form of contractual relation, and is necessarily subject to be invalidated wherever it is proffered to a tribunal as the basis of a right. These considerations are fundamental, and the authorities which prove that the judgment of a court cannot be impeached collaterally, and is therefore obligatory upon an auditor, have no application.

Decree reversed, etc.

For appellant, *B. F. Eshleman, Esq.*

Contra, Wm. Aug. Atlee, Esq.

Circuit Court, United States.

Western District of Pennsylvania.

THE MISSOURI FURNACE CO. v. HANNAH M. COCHRAN, Administratrix of JOHN M. COCHRAN, Deceased.

Defendant's intestate sold and agreed to deliver to plaintiff, the proprietor of blast furnaces for smelting iron, 36,621 tons of Connellsville coke, at \$1.20 per ton, deliverable, in equal daily quantities, on each working day during the year 1880. After delivering 3,765 tons, the vendor, without valid excuse, notified plaintiff, on February 13, 1880, that he rescinded the contract, and thereafter delivered no coke. The vendor persisting in his refusal to deliver, the plaintiff, on February 27, 1880, made a substantially similar forward contract with H for the delivery, during the balance of the year, of 29,587 tons of such coke at four dollars per ton, which was the then market rate for such a forward contract, and rather below the market price for present deliveries. The market price of coke declined in May, 1880,

to \$1.30 per ton. The plaintiff brought suit on February 26, 1880.

Held, (1) that the plaintiff was not entitled to recover the difference between the price stipulated in the contract sued on and the price which the plaintiff agreed to pay H under the contract of February 27, 1880; (2) that the measure of damages was the sum of the differences between the price stipulated in the contract sued on and the market price of Connellsville coke, at the place of delivery, on the several days when the several deliveries should have been made under the contract.

Sur motion ex parte plaintiff for a new trial.

Opinion by *ACHESON, D. J.* Filed August 26, 1881.

This suit, brought February 26, 1880, was to recover damages for the breach by John M. Cochran of a contract for the sale and delivery by him to the plaintiff of 36,621 tons of standard Connellsville coke, at the price of \$1.20 per ton (subject to an advance in case of a rise in wages), deliverable on cars at his works, at the rate of nine cars of 13 tons each per day on each working day during the year 1880. After 3,765 tons were delivered, Cochran, on February 13, 1880, notified the plaintiff that he had rescinded the contract, and thereafter delivered no coke. After Cochran's refusal further to deliver coke, the plaintiff made a substantially similar contract with one Hutchison for the delivery during the balance of the year of 29,587 tons of Connellsville coke at \$4 per ton, which was the market rate for such a forward contract, and rather below the market price for present deliveries, on February 27, 1880, the date of the Hutchison contract.

The plaintiff claimed to recover the difference between the price stipulated in the contract sued on, and the price which the plaintiff agreed to pay Hutchison under the contract of February 27, 1880. But the court refused to adopt this standard of damages, and instructed the jury that the plaintiff was "entitled to recover upon the coke which John M. Cochran contracted to deliver and refused to deliver to the plaintiff, the sum of the differences between the contract price—that is, the price Cochran was to receive—and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract." Under this instruction there was a verdict for the plaintiff for \$22,171.49. As the plaintiff had in its hands \$1,521.01 coming to the defendant for coke delivered, the damages as found by the jury amounted to the sum of \$23,692.50.

The plaintiff moved the court for a new trial; and, in support of the motion, an earnest and certainly very able argument has been made by the plaintiff's counsel. But we are not con-

vinced that the instruction complained of was erroneous.

Undoubtedly it is well settled, as a general rule, that when contracts for the sale of chattels are broken by the vendor failing to deliver, the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered: Sedgwick on the Measure of Damages (7th Ed.), 552. In *Shepherd v. Hampton*, 3 Wheat., 200, this rule was distinctly sanctioned. Chief Justice MARSHALL there says: "The unanimous opinion of the court is, that the price of the article at the time it was to be delivered is the measure of damages." *Id.*, 204. Nor does the case of *Hopkins v. Lee*, 6 Wheat., 118, promulgate a different doctrine; for, clearly, "the time of the breach" there spoken of, is the time when delivery should have been made under the contract.

It is said in Sedgwick on the Measure of Damages (7th Ed.), 558, note *b*: "Where delivery is required to be made by installments, the measure of damages will be estimated by the value at the time each delivery should have been made." In accordance with this principle the damages were assessed in *Brown v. Muller*, Law Rep., 7 Ex., 319, and *Roper v. Johnson*, Law Rep., 8 C. P., 167, which were suits by vendee against vendor for damages for failure to deliver iron, in the one case, and coal, in the other, deliverable in monthly installments. In one of these cases suit was brought after the contract period had expired, in the other case before its expiration; but in both cases the vendor had given notice to the plaintiff that he did not intend to fulfill his contract. To the argument, there urged on behalf of the vendor, that upon receiving such notice it is the duty of the vendee to go into the market and provide himself with a new forward contract, KELLY, C. B., in *Brown v. Muller*, said: "He is not bound to enter into such a contract, which might be to his advantage or detriment, according as the market might fall or rise. If it fell, the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand."

Where the breach is on the part of the vendee, it seems to be settled law that he cannot have the damages assessed as of the date of his notice that he will not accept the goods: Sedgwick on Measure of Damages, 601. The date at which the contract is considered to have been broken by the buyer, is that at which the goods were to have been delivered, not that at which he

may give notice that he *intends* to break the contract: Benjamin on Sales, sec. 759. And, indeed, it is a most rational doctrine that a party, whether vendor or vendee, may stand upon his contract and disregard a notice from the other party of any intended repudiation of it. If this were not so, the party desiring to be off from a contract might choose his own time to discharge himself from further liability.

The laws to the effect of such notice is clearly and most satisfactorily stated by COCKBURN, C. J., in *Frost v. Knight*, Law Rep., 7 Ex., 112. "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him to decline to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss."

We do not think the force of the English cases referred to has been at all weakened by that of the *Dunkirk Colliery Company v. Lever*, 41 Law Times Rep. (N. S.), 632, so much relied on by the plaintiff's counsel. Nor are the facts of that case similar to those of the case in hand. There the controlling fact was that at the time the vendee definitively refused to accept, *there was no regular market for cannel-coal*, and the vendors resold as soon as they found a purchaser according to the ordinary course of their business, and without unreasonable delay. Therefore, it was held that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained.

Our attention has been called to *Masterton v. Brooklyn*, 7 Hill, 61. Undoubtedly this is a leading case in this branch of the law, and especially upon the subject of the profits allowable as damages, and the principles upon which they are to be ascertained. The suit, however, was upon a contract to procure, manufacture, and

deliver marble for a building, and involved an investigation into the constituent elements of the cost to which the contractor might have been subjected had the contract been carried out, such as the price of rough material in the quarry, expenses of dressing, etc. Upon the question as to the time at which the cost of labor and materials was to be estimated the court was divided, and I do not find that the views of the majority upon this precise point have been followed. The case, however, lacked the element of market value, (*Id.* 70); and as Judge NELSON cited with approbation *Boorman v. Nash*, 9 Barn. & C., 145, and *Leigh v. Paterson*, 8 Taunt., 540, it cannot be supposed that the court intended, in a case of a marketable article having a market value, to sanction the principle contended for here.

I see nothing in the present case to distinguish it from the ordinary case of a breach by the vendor of a forward contract to supply a manufacturer with an article necessary to his business. For such breach what is the true measure of damages? Says KELLY, C. B., in *Brown v. Muller*: "The proper measure of damages is that the sum which the purchaser requires to put himself in the same condition as if the contract had been performed." That result—which is compensation—is secured, it seems to me, by the rule given to the jury here, unless the case is exceptional. The vendee's real loss, whether delivery is to be made at one time or in installments, ordinarily is the difference between the contract price and the market value at the times the goods should be delivered. If, however, the article is of limited production, and cannot for that, or other reason, be obtained in the market, and the vendee suffers damage beyond that difference, the measure of damages may be the actual loss he sustains: *McHose v. Fulmer*, 73 Pa. St., 367; *Richardson v. Chynoweth*, 26 Wis., 656; *Sedgwick on Dam.*, 554. With this qualification to meet exceptional cases, the rule that the damages are to be assessed with reference to the times the contract should be performed, furnishes, I think, a safe and just standard from which it would be hazardous to depart.

In this case I fail to perceive anything to call for a departure from that standard. There was no evidence of any special damage to the plaintiff by the stoppage of its furnaces, or otherwise. Furthermore, the contract with Hutchison, February 27, 1880, was made at a time when the coke market was excited and in an extraordinary condition. Unexpectedly and suddenly coke had risen to the unprecedented price of four dollars per ton; but this rate was of brief duration. The market declined about May 1,

1880, and by the middle of that month the price had fallen to one dollar and thirty cents per ton. The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved to be a most unfortunate venture. By the last of May, 1880, the plaintiff had in its hands more coke than was required in its business, and it procured—at what precise loss does not clearly appear—the cancellation of contracts with Hutchison to the extent of 20,000 tons. As the plaintiff was not bound to enter into the new forward contract, it seems to me it did so at its own risk, and cannot fairly claim that the damages chargeable against the defendant shall be assessed on the basis of that contract.

The motion for a new trial is denied.

For plaintiff, Messrs. George Shiras, Jr., S. Schoyer, Jr., and Henry Hitchcock.

Contra, Messrs. D. T. Watson, C. E. Boyle and Jas. S. Moorhead.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 17th inst., all the Justices being present:

PER CURIAM.

Neud's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

John F. Jennings's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

Kountz's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

School District of McKeesport v. D. Knox Miller. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Bellstein v. Shearer. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Ward v. Pollock. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Birmingham Insurance Company v. Kronk. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Montour Railroad Company v. Scott. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Herman v. City of Allegheny. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

McCullough v. Monongahela Building and Loan Association. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Commonwealth v. McCullin. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

J. W. Porter v. A. Zeitlinger et al. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Faulkner's Appeal from the decree of the Court of Common Pleas, No. 2, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

John W. Leaman v. Commonwealth of Pennsylvania. Certiorari to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Pittsburgh & West End Passenger Railway Company v. Jones. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Monongahela Water Company v. Stewartson et ux. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Michael O'Hara et ux. v. Thomas Mellon. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

A. J. Cochran v. John Creighton. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

By MERCUR, J.

In re Contested Election of John O'Neill. Order affirmed. By GORDON, J.

The Commonwealth of Pennsylvania v. The Gloucester Ferry Company. Error to the Court of Common Pleas of Dauphin county. The judgment of the court below is now reversed and it is ordered that judgment on the case stated be entered for the Commonwealth and against the defendant, in the sum of \$2,593.96, with interest from July 7, 1880, Attorney-General's commissions and costs. Mr. Justice GREEN dissents and files an opinion.

GENTLEMEN OF THE BAR, in the Western District of Pennsylvania, will please take notice that sixteen paper books, on each side, are required in the Supreme Court.

J. B. SWEITZER, *Proth'y.*

NEW BOOKS.

A TREATISE ON THE LAW OF PARTNERSHIP, including its application to companies. Fourth Edition. By the Hon. Sir NATHANIEL LINDLEY, Knt., one of the Justices of Her Majesty's High Court of Justice. Assisted by SAMUEL DICKINSON, of Lincoln's Inn, Esq., Barrister at Law. Edited and annotated by MARSHALL D. EWELL, LL. D. In two volumes, pp. 1214. (Chicago: CALLAGHAN & Co. 1881,

The English edition of this work has always had an enviable reputation with the profession in Great Britain, and has often been cited with approval by the courts of that Kingdom. In this edition Prof. Ewell has presented in notes the substance of the American law upon the subject of partnership, taking for a text only those portions of the original work applicable to the law as it exists in this country, and adding a chapter upon American unincorporated joint-stock companies. Over thirty-five hundred American cases are cited and the majority of them digested. The work will undoubtedly be the standard authority in this country.

A TREATISE ON THE LAW OF JUDGMENTS, including all final determinations of the rights of parties in actions or proceedings at law or in equity. By A. C. FREEMAN, Counselor at Law. Third Edition, revised and greatly enlarged. San Francisco: A. L. HANCROFT & Co. 1881.

The first edition of this work was issued in 1873 and was so well received by the profession that a second was issued the following year. In the present edition the text has been increased by one-sixth and over twelve hundred new au-

thorities are cited. The excellent reputation achieved by the work will be greatly enhanced by the present issue, which, throughout, bears evidence of the care and thoroughness in preparation which marks all of Mr. Freeman's work. The book is well indexed and handsomely printed and bound.

—The *Albany Law Journal* pays its respects to Volume LXXXI½, Pennsylvania State Reports, by P. Frazier Smith, in the following terse and vigorous language: "The reporter states in a note that these cases 'were not ready for publication when the 82d volume of Pennsylvania State Reports was issued.' Why not, or whose fault it was, he does not state. He continues: 'Considerations of a personal character occurring since then have delayed their publication until now. Those cases of the earlier dates, for satisfactory reasons, were laid aside at the time of their decision, designing to introduce them in a final volume.' Mr. Smith's reportership ceased with volume 81. He has now apparently gleaned all the cases that he originally thought not worth publishing, and injected them into the series, 'for considerations of a personal character.' There is hardly a case of importance and general interest in the volume. The cases are nearly all mere *per curiam* memoranda, and the volume is padded with long statements, reports of testimony, and arguments. Of course the profession in Pennsylvania will be forced to buy this afterbirth, and if Mr. Smith should issue as many star volumes as there are stars in the sky, they would be compelled to take them all. But after a careful examination we can say that the volume is of no importance to anybody outside the State, and it is difficult to conceive that it is of any importance to anybody in the State. The decisions could hardly be less important if Mr. Smith really had 'adjudged' them, as his title-page says he did."

—We have received from Messrs. T. & J. W. Johnston, of Philadelphia, through Mr. F. G. Kay, of this city, phototypes (with *fac similes* of signatures) of John Jay, William Cushing, J. Rutledge, J. Marshall, and Oliver Ellsworth, which are issued in connection with Flander's lives of the Chief Justices, and are, in future editions of the work, to be bound in it.

—One of the Pittsburgh daily newspapers, in giving a list of the decisions handed down by our Supreme Court on Monday last, gravely announced that "the opinions did not bear the names of the judges, as usual, but simply the words '*per curiam*.'"

Pittsburgh Legal Journal.

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E. Y. BRECK, : : : : Editor.

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No. 11.

PITTSBURGH, PA., OCTOBER 26, 1881.

Supreme Court, Penn'a.

JIMISON et al. v. REIFSNYDER.

Evidence of excessive distress is irrelevant in an action of replevin. The remedy for the wrong is by an action on the case founded on the Statute of Marlbridge.

Karns v. McKinney, 24 P. F. Smith, 387, followed.

A landlord having distrained on property found on the premises demised, a portion whereof belonged to an under-tenant of the lessee who was in without the landlord's consent, the under-tenant cannot compel the landlord to cause to be sold the goods of his lessor, before satisfying the rent out of his own.

This principle is not affected by the fact that the under-tenant may have paid his rent in full to his landlord, the lessee of the whole premises.

If the under-tenant replevy his property and enter security, the landlord is precluded from proceeding further against the goods replevied, and the exercise of his right to stay proceedings against the other goods distrained upon, does not render invalid any act of his prior to the execution of the writ of replevin, which was valid when performed.

Therefore the stay of proceedings is not such a release or discharge of the lessee as would relieve the under-tenant from liability.

Error to the Court of Common Pleas, No. 2, of Philadelphia county.

Replevin, by J. P. Reifsnyder against Thomas H. Powers and William Weightman, trading as Powers & Weightman, and James K. Jimison. The latter was summoned and the property was delivered to the plaintiff upon his entry of security. *Nihil habent* was returned as to the other defendants.

The declaration in replevin alleged the taking and detention of the plaintiff's goods on the demised premises. The sheriff having returned *nihil habent*, as to Powers & Weightman, their bailiff, James K. Jimison, filed his cognizance, acknowledging the taking of the plaintiff's goods on the demised premises as a distress for rent then due and in arrears to Powers & Weightman.

The plaintiff filed three pleas. The first denied that Jimison was the bailiff of Powers & Weightman, and tendered issue. The second denied that any part of the rent mentioned in the cognizance was due and in arrears from Hall & Richardson, the lessees, to Powers & Weightman, and tendered issue. The third plea aver-

red that at the same time the plaintiff's goods were distrained, the defendants also levied on the goods of Hall & Richardson, the lessees of Powers & Weightman, which were more than sufficient in value to pay the said rent; yet the defendants released and discharged the goods of Hall & Richardson from all liability for said rent, although requested by the plaintiff to proceed, in the first instance, to make the rent out of the goods of Hall & Richardson, which they refused to do.

The defendant, in his replication to the said third plea, traversed the alleged release and discharge of the goods of Hall & Richardson, from the said distress for the said rent so due and in arrears to Powers & Weightman, as in the said third plea set forth.

The facts, as they appeared upon the trial, were as follows: On April 1, 1868, Powers & Weightman demised the premises in question to Hall & Richardson. Soon afterwards, in violation of the terms of the lease, Hall & Richardson sublet a portion of the premises to Reifsnyder, whose tenancy never was recognized by Powers & Weightman. Hall & Richardson being in arrears for rent, Powers & Weightman, by Jimison, their bailiff, distrained on the goods upon the premises upon April 20, 1878. The rent in arrear was \$675. The distress was \$5,000 of the goods of Hall & Richardson, and \$3,000 of the goods of Reifsnyder. The different ownership was not known to the bailiff. After the levy, Reifsnyder asked Powers & Weightman to release his goods, telling them that they had sufficient of Hall & Richardson to satisfy the rent, and if not, they could sell his. This they refused to do. He also requested the bailiff to proceed in the first instance to sell the goods of Hall & Richardson; but the bailiff also declined to accede to this request, whereupon, on April 23, Reifsnyder replevied his goods, giving bond in the sum of \$4,000. Power & Weightman then instructed their bailiff to stay proceedings against the goods of Hall & Richardson, which was accordingly done.

The defendant requested the Court (HARE, P. J.), to charge:

1. That on April 1, 1878, Hall & Richardson, lessees, being indebted to their landlords, Powers & Weightman, in the sum of \$675 for rent of the demised premises, Sixth and Oxford streets, Philadelphia, and then in arrear, they had the right, by their bailiff, the defendant, to distrain on the goods and property of the plaintiff, Reifsnyder, described in the writ of replevin, at that time found on the demised premises, in satisfaction of the said rent so in arrears.

2. That even if there were other goods and

property on the demised premises, at the time of the said distress, not embraced in the present replevin, *sufficient in value* to satisfy the said rent then in arrears, still the plaintiff's said goods, found on the demised premises at the time of the said distress, were liable for the said rent, and the said distress thereupon was proper and lawful.

The court declined to charge as requested, and instructed the jury to find for the defendant on the issues joined on the first and second pleas, and left the issue joined on the replication to the third plea to the avowry (cognizance) to the jury, on the evidence.

Under the court's instructions the jury found for the defendant on the issues joined on the first and second pleas, assessing the rent in arrears at \$755, and finding the value of the goods distrained, \$2,000.

On the issue joined on the replication to the third plea, the jury found for the plaintiff.

A motion for judgment on the whole record, *non obstante veredicto*, was dismissed, the Court, per HARE, P. J., delivering the following opinion:

"The question presented by the record is, can a stranger to the lease, whose property had been taken under a distress made for the rent, require that the constable shall not offer his goods for sale until the tenant's goods have been sold and found insufficient to pay the debt? I state this as the question, because an under-tenant owes nothing to the landlord, and can claim no more from him than a stranger whose goods are accidentally on the premises at the time of the levy. The legal right of the landlord is absolute, and the point to be determined is, whether he should so exercise it as not to sacrifice the stranger's property unless such a course is requisite for his own protection. It is well settled under the authorities, that a creditor should not be delayed or hindered in the use of any remedy for the satisfaction of the debt, even when the effect of refusing the injunction will be to throw the burden on one who, like a surety, is not primarily or ultimately liable, and thus give rise to a circuity of action; but it is not less clear that when the fund or property in question is within the grasp of the law, and the question is merely as to the order in which it should be sold or appropriated, a chancellor may well direct that the principal debtor's goods shall be the first brought to the hammer, and the execution stayed if they produce enough to satisfy the claim. If such be the rule, it applies emphatically in the present instance, where the plaintiff's modest demand was not for the delay or omission of any step requisite to make the

distress effectual, but that the landlord should, out of the whole mass of goods levied on, select those which belonged to the tenant, and dispose of them before proceeding to sell the plaintiff's goods for a debt which he did not owe. We have arrived at this conclusion with some diffidence, because the case appears to be one of first impression, and we do not desire to complicate or embarrass a remedy which is not less valuable to the tenant by enabling him to obtain credit, than to the landlord as a security for the rent; but we do not perceive that any inconvenience can arise from requiring that when the goods of a tenant and of an under-lessee or stranger have both been distrained for rent in arrear, the tenant's shall be first sold, as being the party who is really answerable.

"The landlord need not postpone the distress, the appraisement, or the sale, for an hour, nor is it incumbent on him to inquire whether the goods which the stranger or under-tenant claims as his, do or do not belong to him. The only restriction imposed is that the goods which are not so claimed shall be offered for sale in the first instance, and so much only of the residue disposed of as may be requisite to satisfy the arrears and costs."

"The plaintiff's equity is stronger in the present instance, because it appears from the pleadings and verdict, that he had paid his rent to Hall & Richardson, which, as KENNEDY, J., intimated in *Quinn v. Wallace*, 6 Wharton, 452, 457, might well exempt his property from liability for the rent due from them, when the lessors actually held a sufficient amount of their property to pay the amount in full."

The defendant thereupon took this writ, assigning for error the refusal of the court to charge as requested, and the refusal to enter judgment *non obstante veredicto*.

For plaintiff in error, *Messrs. William Ernst and R. J. C. Walker*.

Contra, L. N. Rich, Esq.

Opinion by MERCUR, J. Filed May 2, 1881.

This complaint is against the plaintiff in error, as bailiff of Powers & Weightman. As such he distrained, for the non-payment of rent, goods on the premises demised by them to Hall & Richardson. The warrant issued and the distress was made on the 20th of April, 1878.

That rent was then due and unpaid is found as a fact. That the goods of the defendant in error found thereon were liable to distress for the rent, cannot, under numerous authorities, be questioned: *Karns v. McKinney*, 24 P. F. Smith, 387.

What, then, is the grievance of which the de-

defendant in error complained, and which he sought to redress in this action? Without the consent of Powers & Weightman, he appears to have leased a portion of the demised premises of Hall & Richardson. Claiming the latter had goods on the premises of sufficient value to satisfy the rent, he demanded of Powers & Weightman that they should release his goods and first proceed against the goods of Hall & Richardson. He also requested the bailiff to proceed first against their goods. On their declining so to do, he, on the second day after the distress, brought this action of replevin for his goods, and gave bail to the sheriff. The latter made return that he had replevied as commanded; had duly summoned Jimison on the 24th of April, 1878, and delivered the property to Reifsnnyder, and *nihil habent* as to the other defendants.

The plaintiff in error made cognizance. The first plea thereto denied that he was bailiff, and the second that there was any rent in arrear. On both these pleas the jury found for the plaintiff in error. The third plea averred that, at the time of taking the goods of defendant in error, the bailiff also took in the same distress, goods of Hall & Richardson, of value more than sufficient to satisfy the rent, and afterwards, to wit, on the 23d of April, 1878, that said Powers & Weightman and said Jimison did release and discharge said last goods from said distraint, knowing the goods in said cognizance mentioned belonged to defendant in error. The replication denied all such release and discharge of said goods. Issue was joined on the pleas, and on this third plea the jury found in favor of the defendant in error. They also found the property distrained was of much greater value than the rent in arrear. The court considered the distress excessive. It appears to have assumed that fact to be fatal to the right of the landlord to distraint, and thereupon entered judgment against the plaintiff in error.

The question of excessive distress was irrelevant in the action of replevin, and the evidence thereof inadmissible: *Karns v. McKinney*, *supra*. If, in fact, the distress was excessive, the proper remedy is by action on the case, founded on the Statute of Marlbridge: 3 Black. Comm., 12; Robert's Dig., 177; *McKinney v. Reader*, 6 Watts., 41; *Karns v. McKinney*, *supra*.

All the facts necessary to give a right to distraint existed. It was exercised by making one distress on property found on the premises, a portion of which belonged to the under-tenant. One complaint now is a refusal within two days after distress made, to release and discharge his

goods from the distraint, or at least to agree to sell first the goods of Hall & Richardson; the other is that the said last goods were released and discharged from the levy. The evidence sustains the fact averred in the first complaint. No authority was cited showing such release to be demandable of right. None that it was error to refuse. The uncontradicted evidence is, that the bailiff made but one distress, and did not at that time know anything about the ownership of the goods distrained. There is no evidence that any of the goods of Hall & Richardson were released and discharged from the levy before the writ of replevin was executed. After its execution, the landlords told their bailiff to stop proceedings. Thereupon he did nothing further, but let them have them, and, as we have shown, the sheriff delivered the others to the defendant in error. This action was not for detaining the goods of the defendant in error after they were replevied, but for refusing to release them before they were replevied. There was really no evidence in support of the third plea to submit to the jury. But having been found, they were insufficient, in law, to support the judgment. It was assumed by the learned judge that the defendant in error had paid his rent to Hall & Richardson. A careful examination fails to find any such averment in the pleadings, or in the evidence on the trial; nor is it found in the verdict as set forth in the paper-book. If, however, such was the fact, it in no wise changed the right of Powers & Weightman to distraint his goods. He was not their immediate tenant; they had not recognized his tenancy. He had not paid them, nor by their authority paid to any other person: *Quinn v. Wallace*, 6 Whart., 452. When his writ of replevin was executed, he gave security which was satisfactory to Powers & Weightman. The goods of the plaintiff in the writ were taken out of their hands. They had a right to rely on that security. They were precluded from then proceeding further against the goods thus replevied, and had an undoubted right to stay proceedings against the other goods distrained. In so doing, after the writ of replevin was executed, they did not in the least render invalid any act of theirs prior to its execution, which was valid when performed.

The court therefore erred in not entering judgment in favor of the defendant below, on the whole record, notwithstanding the verdict on the third plea. This view of the case makes any more specific answers to the assignments unnecessary.

Judgment reversed, and judgment in favor of the plaintiff in error, non obstante veredicto.

WORKINGMEN'S BUILDING AND LOAN ASSOCIATION, Defendant Below, v. CHARLES E. RUMFORD.

If the plaintiff, in a pending suit, mark it to the use of others without their knowledge, and on being informed thereof, they protest of record against it, such a disclaimer prevents a recovery based on equitable rights in them.

If the treasurer of an association has sufficient funds thereof in his hands, and in lieu of paying in money an order duly drawn on him, give the holder his individual note indorsed, and the indorsers afterwards pay the note, this does not give to the former holder a right of action against the association although they indorsed under a mistaken idea that they were sureties for the treasurer.

Such facts are insufficient to create any privity of contract between the indorsers and the association, and cannot give the holder a right of action against the latter.

Error to the Court of Common Pleas of Dauphin county.

Opinion by MERCUR, J. Filed October 3, 1881.

On withdrawing from the association, the defendant in error accepted an order on the treasurer of the company, duly signed by the president and secretary, for the sum he was entitled to receive. The order was dated on the 5th of February, but was not handed to him until the 27th. At its date the money in the hands of the treasurer was not sufficient to pay it. Its delivery was therefore withheld until other and sufficient funds had been put into his hands. At the time of its delivery the funds were sufficient. Failing to get the money on the order, on the 16th of March he gave it to Luerssen, the treasurer, taking his check, dated four days thereafter, for the amount. On presenting this check at the bank there was no money to meet it. On the 4th of April, in place of this check, he took the note of Luerssen at thirty days, with interest, payable to the order of George Faerster and William M. Hamer, and by them indorsed. They paid the note before or at maturity, so the defendant in error received the money before he commenced this suit.

It is not necessary to discuss the question whether giving time and taking the note with security, operated as a payment of his claim against the association before the note was actually paid, as the case does not stop there. The note was paid. The money was received by the defendant in error, and is still retained by him. He now claims that inasmuch as Faerster and Hamer indorsed the note of Luerssen under a mistaken belief that they were security for him as treasurer of the association, it gives a right of action to recover the same money of the

company. If this note had been given at the request of the company, and the defendant in error had been compelled to repay the money to the indorser, a different question would arise, but such are not the facts presented here. The court charged: "The question of Rumford's liability to repay to the indorsers, is not involved here, and whether he is or is not, does not affect the liability of this defendant." In this the learned judge erred.

If the debt due the defendant in error has been fully paid to him under an arrangement with Luerssen, who was justly bound to pay it, we cannot see on what principle the association has again become liable to pay it. The court appears to have blended the rights of the defendant in error with the rights of the indorsers. It therefore charged that "the suit is marked for the use of George Faerster and W. M. Hamer, the equitable plaintiffs, and the court can protect these interests in case of a recovery."

Several reasons may be stated why this view is not correct. They were not parties to the action. The suit was brought in the name of the defendant in error alone. After the case was put at issue, he caused the suit to be marked for the use of Faerster and Hamer; but they afterwards, by their counsel, appeared in court, and protested against the suit being so marked, all of which is shown by the record. This was a most unequivocal disclaimer of the submission of any of their rights to be passed upon in the trial of the cause. Having thus withdrawn the suit stood as if their names had never been put on the record. It should then have been tried as it was commenced on the exclusive right of the defendant in error. If the indorsers acquired any right of action by reason of their payment of the note, it was either against the defendant in error, or Luerssen, or both of them. A right to recover in this suit depends on the validity of a lawful claim of the defendant in error against the association, and not on the equities of the indorsers. By indorsing and paying the individual note of Luerssen, they did not become creditors of the association. When the order was delivered the latter had enough money in the hands of its treasurer to pay the order. Without so applying it, and after giving a check which was dishonored, he gave this individual note to pay money for which he was personally liable. To discharge his liability to the association he gave his own note to a creditor to whom it was paid. A misapprehension between the maker and the indorsers of the note, as to the liability of the latter as surety to the treasurer, does not make the association liable to them. There was no

privity of contract between it and them. Their purpose was not to pay its debt, but a debt of Luerssen. He had no power to bind the association for the payment of this note, and he did not assume to do so. It follows that the first, tenth and eleventh assignments are sustained, and so much of the sixth as in conflict with this opinion. We see no error in the remaining assignments.

Judgment reversed and a venire facias de novo awarded.

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In Re Contested Election of JOHN O'NEIL.
Appeal of the COMMISSIONERS OF ALLEGHENY COUNTY.

Although elected by the people of part of a county, a member of the Legislature is a representative of the whole county, and it is liable for the costs in case of a contested election.

Certiorari to the Court of Common Pleas, No. 2, of Allegheny county.

Opinion by MERCUR J. Filed October 17, 1881.

The court found and adjudged O'Neil to be duly elected a member of the House of Representatives in the Third Legislative District of the county of Allegheny. It further ordered the county to pay the costs of the proceeding. The power of the court to so impose the costs is questioned by the county, and presents the only contention in the case.

It is argued, inasmuch as O'Neil was elected in a district composed of four wards of the county, those wards only and not the whole county is legally chargeable with the costs. There is some plausibility in this view; but it cannot bear the test of a careful examination.

The power to impose costs is given by statute. Art. 11, Sec. 17, of the Constitution, declares "the members of the House of Representatives shall be apportioned among the several counties on a ratio" stated therein. The Act of 19th May, 1874, declares "the county of Allegheny shall be entitled to fourteen members" and then proceeds to divide it into six districts. Thus the county is entitled to the whole number specified; but probably to secure a more just representation of the sentiment of all the electors of the county, it is divided into districts for election purposes. For all other purposes the county remains entire. Although elected by the people of a part of the county, he is nevertheless a representative of the whole county.

It is argued that under the 9th section of the Act of 19th May, 1874, Pur. Dig., p. 1872, and the 1st section of the Act of 8th May, 1876, *Id.*, p.

2009, the costs must be imposed on that part of the county which participated in the election. The Act of 1874 does declare "the proper district, county, city, township, borough, ward, shool district, or municipality, shall be liable to pay all costs and the same shall be paid by the proper authorities, upon the order of the court or judge trying the case." This act applies to contests in the election of president and additional law judges, to senators and members of the House of Representatives, and to county, city, borough and township officers. The Act of 1876 authorizes the court to apportion the costs among the proper districts or municipalities of the whole district in which contest is had in such way as said court or judge shall think just, and "to compel the payment thereof by the properly constituted authorities of each as the payments of debts by the same can now be enforced."

The application of these acts is not limited to cases of contested elections of municipal officers within a county. When the district of a judge or a senator is composed of two or more counties, the power to impose costs is coextensive with the district. Due and full effect can be given to the language and the spirit of the statute by applying it to "districts" of that character. There each county forms a municipal corporation with "properly constituted authorities" who may be compelled to make payment. The district in which O'Neil was elected is not a municipal district. It is not a corporate body capable of suing or being sued. It has no "properly constituted authorities" with power to find it, to levy and collect taxes or liable to pay costs. There is no official thereof to whom an order of the court for payment could be directed. There is no treasurer, no fund. The act declares the payment shall be compelled "as the payment of debts by the same can now be enforced." As the law now makes no provision for enforcing the payment of any debt against such a district, it is clear the act was not intended to charge the costs thereon. As still further indicating the costs may be put on the whole county, the act does not require the petitioners who initiate the contest to be qualified electors of the district in which the member of the House of Representatives is elected; but "qualified electors of the county" fully satisfies the language of the statute. The learned judge committed no error in holding the county liable.

Judgment affirmed.

For the county, S. H. Geyer, Esq., County Solicitor.

Contra, Messrs. F. M. Magee and West Mc-Murray.

COMMONWEALTH ex rel. GUSTAV MARK,
Plaintiff Below, v. WILLIAM McCALLIN.

The Act of April 3, 1872, P. L., 843, relating to licenses for the sale of intoxicating liquors is not repealed by the Act of April 12, 1875, P. L., 40.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an application for a mandamus to compel the County Treasurer of Allegheny county to issue a license to the relator to sell liquor upon the payment of \$50, as provided in the Act approved April 12, 1875, P. L., 40. The application was refused, STOWE, P. J., filing the following opinion:

"The whole question involved in this case is, whether the Act of Assembly, approved April 3, 1872, entitled, 'An Act to regulate the sale of intoxicating liquors in the county of Allegheny,' was repealed, as to the classification and rating of hotels, etc., by the act to 'restrain and regulate the sale of liquors,' and 'to repeal an act to permit voters of this Commonwealth to vote every three years on the question of granting licenses to sell intoxicating liquors,' approved April 12, 1875.

"This question was before the court last year, (*Commonwealth ex rel. O'Neill v. McCallin, Treasurer, etc.*, 27 PITTSBURGH LEGAL JOURNAL, 161), at which time we were of opinion that the Act of 1872 was repealed, as to classification and rating, by the Act of 1875. Were it not for the decision of the Supreme Court, in *Kilgore v. Commonwealth*, 27 PITTSBURGH LEGAL JOURNAL, 230, announced since *Commonwealth ex rel. O'Neill v. McCallin*, I would still think the views then expressed were demanded by both principle and authority. But there can be no controversy that Judge GORDON, in delivering the opinion in *Kilgore v. Commonwealth*, expressed a different view of the question, and did most emphatically declare as the opinion of the court, that the Act of 1872 was not repealed by the Act of 1875. This comes to us with the authority of law, and whatever our views might otherwise have been, it is now our duty fully and in good faith to carry out the doctrine there announced to its legitimate result. The inevitable conclusion, therefore, is, that the mandamus prayed for must be refused. Demurrer overruled; and we do now order and adjudge that judgment be entered upon the demurrer for the defendant."

This writ was then taken, there being assigned for error: (1) Refusing the writ of mandamus; (2) overruling the demurrer and entering judgment thereon in favor of the defendant; (3) not entering judgment upon the

demurrer in favor of the relator, and granting the writ of mandamus.

For the relator, *Messrs. A. M. Brown, R. M. Gibson and Josiah Cohen.*

Contra, D. D. Bruce, Esq.

PER CURIAM. Filed October 17, 1881.

After hearing the able argument of the learned counsel for the plaintiff, we see no reason to change the opinion expressed by the court in *Kilgore v. Commonwealth*, 27 PITTSBURGH LEGAL JOURNAL, 230, "that neither directly nor by implication does the Act of 1875 repeal that of 1872." The Act of 1872 was unquestionably constitutional when it was passed, and it must continue to be the law until repealed.

Judgment affirmed.

THE MONONGAHELA WATER COMPANY,
Defendant Below, v. STEWARTSON et ux.

Where the plaintiff gives evidence of negligence on the part of the defendant, without showing contributory negligence, the burden of showing such contributory negligence is on the defendant.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

The defendant company was incorporated under the laws of Pennsylvania for the purpose of supplying water to that part of the city of Pittsburgh on the south side of the Monongahela river. In 1876 an excavation was made in Plain avenue, an unpaved street, for the purpose of laying water pipes. The plaintiff saw the men at work at the excavation during the day, but in the evening, as she was proceeding down an alley leading to Plain avenue, she fell into the excavation and sustained injuries. On the trial of the cause in the court, plaintiff's counsel (*inter alia*) presented the following point:

"3. The burden of proving contributory negligence upon plaintiff's part is on the defendant, and to escape liability on this ground they must satisfy the jury by the weight of the evidence that the plaintiff was guilty of some act of omission or commission, inconsistent with the conduct of an ordinarily careful and prudent person under all the circumstances. If there be no such evidence, then the presumption is against the defendant, whose misconduct rendered the accident possible."

The affirmation of which (*inter alia*) was assigned as error. (First assignment).

For plaintiff in error, *Thos. M. Marshall, Esq.*
Contra, Messrs. W. C. Moreland, Hampton & Dalzell.

PER CURIAM. Filed October 17, 1881.

The second and third errors were not assigned according to the rule, but we think that if they had been, they would not have availed the

plaintiff in error. Undoubtedly if the plaintiff gave evidence of negligence on the part of the defendant, and her own evidence showed no contributory negligence on her part, the burden of showing such contributory negligence was on the defendant. The affirmation of the plaintiff's third point was therefore entirely right.

Judgment affirmed.

Orphans' Court.

IN PARTITION.

In Re Estate of ISAAC JONES, Deceased.

When a parent gives money to a child and takes a note or bond for its repayment, it is a debt and not an advancement.

J executed a declaration of trust, in which he provided that the income from certain mortgages held by him should be applied to the support and education of the son of his daughter M during his minority; and that when he arrived at his majority, if M was then living, they were to be her property, J having died intestate. Held, that this was not an advancement to M, and that the amount of the mortgages could not be deducted out of her share of her father's estate.

Opinion by OVER, J. Filed September 20, 1881.

The auditor has found that Charles E. Jones is to be charged as an advancement with \$20,016.08, money furnished by Isaac Jones, the decedent, to him as a member of the firm of Jones, Ingold & Co. To which finding exceptions are filed.

This \$20,016.08 is the proportion of money expended, as appears by the individual books of Isaac Jones, by him for the firm of Jones, Ingold & Co., with which he charges his son, Charles E. Jones. The items being charged against the firm, and then a summary made, in which the aggregate is apportioned between Charles E. Jones and J. M. & Eugene Ingold who composed the firm. In closing the account with the firm, Charles E. Jones is credited with his bond for this \$20,016.08, and the Ingolds with their bonds for the amounts apportioned to them in the summary.

It is well settled that when a parent gives money to a child and takes a note or bond for its repayment, it is a debt and not an advancement. There is no doubt, then, that this was a debt; and as there is no evidence that it was converted into an advancement, the auditor erred in finding it to be an advancement and charging it against Charles E. Jones as such.

As a debt, under the authority of *Springer's Appeal*, 29 Pa. St., 208, it might be proper to charge Charles E. Jones with it in this proceeding if it is established as a still existing debt against him.

It appears from the testimony that Isaac Jones, the decedent, purchased for the firm of

Jones, Ingold & Co., the real estate on which their works were erected, made the contracts for the erection of the same and paid the contractors, furnished all the capital used by the firm and largely controlled its business. The business was not prosperous and he had the firm's personal property sold at sheriff's sale and purchased the same, and the members of the firm conveyed all the real estate and remaining firm assets to him. And he executed a written release in favor of the Ingolds, releasing them from liability to him, in which he expressly reserved all claims against his son, Charles E. Jones. One witness, however, testifies that he told him he had taken the property for the debt, and that his son Charles did not owe him anything.

The bond taken by him for this \$20,016.08 does not appear to have been produced or offered in evidence before the auditor. If it cannot be produced or accounted for it would be strong corroborative evidence that the decedent had cancelled the debt and accepted the firm's property in satisfaction thereof. And would we think, in connection with the other testimony and circumstances of the case, justify the finding that such was the fact. The bond being the best evidence of the debt, if it was sought to charge Charles E. Jones with it as a debt in this proceeding, should have been offered in evidence, or its non-production accounted for and secondary evidence offered to establish the debt. As this was not done he cannot be charged with the amount of the bond in this proceeding. The exceptions to this part of the auditor's report are sustained.

The auditor has found that Mrs. Emma Myers is to be charged as an advancement with \$20,000, the amount of three mortgages, mentioned in a declaration of trust made by Isaac Jones on the 31st of December, 1875. To which finding exceptions are filed.

Mrs. Myers had been married to Doctor McCandless, by whom she had a son, Guy McCandless. She was afterwards divorced from the Doctor and married Mr. Myers. After her divorce Isaac Jones applied to the Common Pleas Court to adopt his grandson, Guy McCandless. Doctor McCandless resisted this application and it failed. Sometime after this the declaration of trust was executed. The purpose of the decedent, as expressed in it, was to make provision for the maintenance and education, and secure to Mrs. Myers the custody and control of the child. Under the declaration of trust the income of the fund was to be applied by Mrs. Myers to the support and education of her son during his minority, when under her control.

She being only entitled to receive it for herself for such time as he might not be under her control. She had no certain vested right, either to the principal or income, and could not have until her son arrived at his majority or at his death prior to that time. Mrs. Myers died since the filing of the auditor's report. Her son, being yet a minor, the trust continues and the trust fund will vest in him absolutely when he becomes of age. It certainly cannot be held that this is an irrevocable gift from Isaac Jones to Mrs. Myers, and if not, it cannot be charged against her as an advancement, unless it is shown he charged it or intended it to be charged against her as such.

Mrs. E. K. Jones, the widow of the decedent, testifies that he gave as a reason why he had not made a will, that he had charged his children with what he had given them. That his papers would show what he had given each one.

In a book kept by Mr. Jones, in which he entered accounts of his mortgages, etc., there is the following entry: "My daughter, Mrs. Emma Myers, formerly Emma Jones: To transfer to her this 31st day of December, 1875, of the interest and premium of the following bonds and mortgages, as recorded in Allegheny and Lawrence counties, which is to be for education and maintenance of Guy P. McCandless." Then follows a brief description of the mortgages, and on account of interest received by the decedent on the mortgages and remitted to Mrs. Myers. In the same book, at the top of pages 14, 21 and 34, where an account had been opened for these mortgages prior to the execution of the declaration of trust, there are the following entries at each account: "This mortgage is transferred to Emma Myers." On pages 33 and 34 of another book, to which he transferred the accounts of two of the mortgages, he specified that they were transferred to Mrs. Myers for the education and maintenance of Guy McCandless.

The auditor has found that the entiries made at pages 14, 21 and 34, by the decedent, show that the mortgages were given to Mrs. Myers. In this, we think, he erred. The mortgages were those referred to in the declaration of trust—the entries are merely memoranda—having reference to the uses for which the mortgages were held, not transfers of the mortgages, and in no way would affect the declaration of trust.

There is no entry in the decedent's books showing that he intended this trust fund as an advancement to Mrs. Myers, to be deducted from her share of his estate. Had it been so intended he probably would have made some entry in his books indicating such intention, as we find that in opening an account with his

son, A. Y. Jones, for moneys given him, he states specifically that the amounts are to be charged against his said son on the division of his estate.

We, then, find from the evidence that Isaac Jones did not charge this trust fund against Mrs. Myers as an advancement, or intend that it should be an advancement to her, and sustain the exceptions to this part of the auditor's report.

Mr. Jones soon after the marriage of his daughter Emma to Doctor McCandless in 1864, gave her five thousand dollars with which to furnish her house. The auditor has found that this is to be charged against her as an advancement and exceptions are filed to this finding. There is no evidence showing what his intention was at the time and no entry in his books charging her with the money. Whether he intended it as a gift or advancement, then, must be inferred from the surrounding circumstances. It was soon after her marriage, and for the purpose of furnishing her house and it is conceded that Mr. Jones at that time was wealthy, worth perhaps two hundred thousand dollars. We think the inference from these facts is that he intended it as a gift and not as an advancement and so find. The exceptions to this part of the report are therefore sustained.

Mr. Jones conveyed to Mrs. Myers a lot in the Fourteenth ward, Pittsburgh, which was afterwards sold at sheriff's sale on a mortgage given by her and purchased by him. He gave her as it accrued out of the rents of this property after he had purchased it one thousand dollars, which the auditor finds is to be charged against her as an advancement. To which finding exceptions are filed.

While there are entries in his books relating to these rents they are made in such a manner as not to throw any light on the question as to whether he intended them as gifts or advancements. The rents were given to her quarterly in sums not exceeding one hundred and twenty-five dollars. The amounts being small we think the presumption is they were gifts. The exceptions to this part of the report are therefore sustained.

We do not think there is sufficient evidence to overcome the presumption that the real estate conveyed by Mr. Jones to Mrs. Myers and C. E. Jones was an advancement to them. The exceptions to this part of the auditor's report are therefore dismissed.

For widow and administrator, *John A. Wilson, Esq.*

For A. Y. Jones, *John Barton, Esq.*

For Chas. E. Jones and estate of Mrs. Emma Jones, *M. A. Woodward, Esq.*

In Re Estate of ISAAC JONES, Deceased.

He who seeks to have an inquisition in partition set aside, must show affirmatively that he has been injured in his rights thereby.

Exceptions to inquisition.

Opinion by HAWKINS, P. J. Filed October 21, 1881.

The only objection to the inquisition suggested by the exceptants, which was insisted upon in argument, was that the widow's share had not been set aside to her by the inquest in real estate.

It may be admitted for the present that it was the duty of the inquest to set apart the widow's share in real estate if it could be done without prejudice to or spoiling the whole estate; and that failure to perform this duty, whether through palpable mistake of judgment as respects values, or other cause manifestly injurious to the rights of the parties interested, should move this court to set aside the inquisition. But before setting it aside, the court must be satisfied by affirmative evidence that the jury did so fail. For with reference to judicial proceedings *omnia præsumuntur rite et solenniter esse acta, donec probetur in contrarium*: Broom's Maxims, 907. This presumption may be overcome (1) by defects apparent on the face of the record, or (2) by evidence *aliunde*. No evidence *aliunde* was offered in this case. But it was alleged that it was apparent from the face of the record "that the jury could without any difficulty or objection have set aside the widow's dower in the real estate to her, and yet neither did so nor reported any reason for not doing so." It may be answered to this that there are circumstances, outside the mere valuation and divisions apparent on the face of the inquisition, which must be taken into consideration in ascertaining whether the action of the inquest was erroneous; and that the law does not require reasons to be given for such action. The inquest was bound to take consideration, not only values, but the arrangement of the different parcels of the estate with reference to convenience and the like before determining whether and how the estate could be divided without prejudice. There is nothing on the face of this record to show that a more advantageous arrangement of the different parcels could have been made or that the exceptants have been in any manner, or to any extent, injured by the division reported. The mere fact that, according to the valuations reported, the widow's share might have been set aside in real estate by a different arrangement of the parcels, therefore proves nothing. The jury may have found, and it must be assumed under the cir-

cumstances did find, that a different arrangement would have been prejudicial to the whole. It will be observed that the exceptants do not allege that the jury failed to pass on the question. But had they made that averment, the burthen of proof would have been on them to have shown it. On the theory of exceptants, part of the jury's duty was to set apart the widow's share in real estate. It was the province of the jury to determine whether it could be done without prejudice to the whole. It must be presumed that they did their duty: *Cromwellien v. Brink*, 29 Pa. St., 522; *Loyd v. McGarr*, 3 Id., 474; *Philadelphia v. Commonwealth*, 52 Id., 451; *McMurray v. Erie*, 59 Id., 2231; *Springbrook Road*, 64 Id., 451; *Middle Creek Road*, 9 Id., 69; *Ewing v. Houston*, 4 Dal., 67; *Walton v. Willis*, 1 Id., 353. And neither in law nor precedent is it required that a detailed account of the performance of that duty should be given in the inquisition. The Act of 1832, upon which this proceeding in partition is based, does not expressly require it. And that it is not impliedly requisite may be inferred from decisions in analogous cases. Thus it is settled that it is not necessary the inquisition should show that notice had been given the parties interested: *Vensel's Appeal*, 77 Pa. St., 71. The same rule is applied to the report of road viewers: *Springbrook Road*, *supra*; *Chartiers Township Road*, 34 Pa. St., 413. If it be unnecessary that the fact of notice should affirmatively appear, the same reasons exist for holding that it is unnecessary to report that the widow's share cannot be set apart in real estate without prejudice. Notice to parties interested is essential to the validity of partition; and no more can be said of the action of the jury with reference to setting aside the widow's share in real estate. It is absolutely necessary that the inquisition should set forth the final result of the examinations and deliberations of the jury, for on that all subsequent proceedings depend. The rule to accept or refuse, the acceptance or refusal of the parties, and the sale on refusal, have direct reference to, and are based upon, this final result. But the successive steps by which the jury attains this result may surely be left to presumption where a record of them is not necessary to the subsequent proceedings, and a recital of them in full would be inconvenient and cumbersome. The return of division into three purparts in this case raised an implication that the jury had found that the widow's share could not be set aside in real estate without prejudice to the whole.

There is another consideration which ought to have weight. The widow is not here com-

plaining of the action of the inquest in the division of the estate. Two of the heirs object to it and one is satisfied with it. The record, as already stated, does not show on its face that any one has been injured by it. But should the inquisition be set aside on the ground suggested by exceptant, and the widow's share be set apart to her in real estate by another inquest, those who are satisfied with the present inquisition would not only have to bear the proportion of the costs and expenses of this new proceeding, but in case of acceptance by the widow, the cost and expense of still another partition, at the widow's death, of the share set apart to her. It does not follow that the widow would accept her share in real estate should it be set apart to her by another inquest. That she is satisfied with the present division, would seem to indicate that she does not desire her share in real estate. Should she refuse to accept, which is probable, and which unquestionably she would have a right to do, the whole proceeding would not only be without advantage to exceptants, but a positive injury to the non-contesting parties. No case has been made out to justify this risk.

The facts on which the decision in *Bishop's Appeal*, 7 W & S., cited on behalf of exceptants in support of their position turned, are wanting here. The face of the return in that case showed that the jury had acted under a misapprehension of the law and had thereby injured the widow in her rights. Here the face of the return is consistent with law and the rights of the parties.

As there is nothing on the face of this record to show that the exceptants have been injured in their rights by the action of the inquest there is no reason for the interference of this court: Freeman on Co-tenancy and Partition.

The court does not desire to be understood as holding that the proper practice is to omit stating in the inquisition that the widow's share cannot be set apart in real estate without prejudice to the whole. Unquestionably the better practice would be to state it; but the statement is not necessary to the validity of the inquisition.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 24th inst., all the Justices except Mr. Justice TRUNKY being present:
PER CURIAM.

Ward v. Fife. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Bolster v. Bismark Building and Loan Association. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Kunglen v. Rick. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Humboldt Fire Insurance Co. v. Mears. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Levy v. Miller. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Levy v. Rosenfeld. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Carothers v. O'Brien. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Hunter v. Gregg. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Levitt's Appeal. Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Order affirmed and appeal dismissed at the costs of the appellant and the record remitted.

Appeal of the Pittsburgh & Lake Erie Railroad and Keller v. Pittsburgh & Lake Erie Railroad. Error and appeal from the Court of Common Pleas, No. 1, of Allegheny county. Order affirmed.

Jones and Wife's Appeal. Error to the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellants.

McGinnes v. Thompson. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Grandin v. Eighth Ward School District. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Commonwealth, for use, v. McLain et al. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Cato v. Allegheny Valley Railroad. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

In re Vacation of Division Street in the Borough of Sewickley. *Certiorari* to the Court of Quarter Sessions of Allegheny county. Proceedings affirmed.

Hemphill v. Commonwealth and Hemphill's Appeal. *Certiorari* and writ of error to the Court of Quarter Sessions of Allegheny county. Writ of error and *certiorari* quashed.

Keller's Appeal from the decree of the Orphans' Court of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellants.

Arthur's Appeal from the decree of the Orphans' Court of Allegheny county. Decree affirmed and modified so as to declare that the probate of the will shall not preclude the widow and child from settling up at any time the invalidity of all other parts of the will except the appointment of executors, and that the costs be paid from the estate of the testator.

By SHARSWOOD, C. J.

Phelp's Appeal. *Certiorari* to the Court of Common Pleas, No. 1, of Allegheny county. Order reversed and record remitted. MERCUR J., dissents from the construction given by the Act of 1856, but concurs in the judgment on the other grounds.

By MERCUR, J.

Schneider v. N. Y. & Cleveland Gas Coal Co. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed. GORDON and TRUNKY, JJ., dissent. By PAXSON, J.

Murphy v. Crossan. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

Steiner v. Erie Dime Savings and Loan Association. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

Pittsburgh National Bank of Commerce v. McMurray. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

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PITTSBURGH, PA., NOVEMBER 2, 1881.

Supreme Court, Penn'a.

WILLIAM SCHNEIDER, Plaintiff Below, v. NEW YORK AND CLEVELAND GAS COAL CO.

Arbitrators were chosen under the compulsory arbitration Act of 16 June, 1836, P. L., 719. At the first meeting of the arbitrators it was agreed in writing between the parties that "the testimony shall be taken by a stenographer and his fee shall be taxed as costs and paid by the losing party." The losing party took an appeal from the award of the arbitrators, first paying all the costs except the stenographer's bill, which was taxed and to which he objected. A rule to quash the appeal for the reason that this bill was not paid was made absolute. *Held*, not to be error.

Parties to actions can, by agreement, make services performed and expenses incurred which are not recognized by the statute, taxable costs.

GORDON and TRUNKEY, JJ., dissent.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

Opinion by MERCUR, J. Filed October 24, 1881.

This contention is as to the right of the court to strike off an appeal from the award of arbitrators under the following facts: They were chosen under the compulsory arbitration law. When they met it was agreed in writing by the parties, that the testimony should be taken by a stenographer (who was present) and his fee be taxed as costs and paid by the losing party. It was further agreed that he should be paid forty cents per printed page. He took testimony, and at the price named, his fees amounted to \$39.60. The arbitrators awarded "in favor of the defendant, together with costs of suit."

At the bottom of the paper containing the award filed, was written "arbitrators' fees, \$105, paid by defendant. Stenographer's fees, not paid, \$39.60." This award, with the entries at the foot thereof, was filed and entered by the prothonotary on the record on the 9th of September. On the 25th the plaintiff filed exceptions to the fees of the stenographer, and then without paying any part of those fees appealed from the award. By reason of their non-payment the court struck off the appeal. This is assigned for error.

The Act of 1836 makes the payment of all costs that have accrued in the suit, a condition precedent to an appeal from the award. If they are not all paid through the fault or negligence of

the party appealing, the appeal will be stricken off, on the application of the opposite party. If, however, the non-payment is caused by the exclusive fault of the officer in withholding from the appellant a knowledge of the existence of a portion of them, the appeal should not be stricken off; but the payment of the omitted portion be enforced by attachment: *Fraleay v. Nelson*, 5 S. & R., 234; *Carr v. McGovern*, 16 P. F. Smith, 457; *Palmer v. Wilkinson*, 23 Id., 339.

Here not only did the record show the return by the arbitrators of the stenographer's fees, but the precise sum was entered on the docket, and the attention of the plaintiff was especially called thereto. He objected to a more formal taxation; filed exceptions and declined to pay them.

The question now presented is, were these fees taxable costs in the case? The written agreement of the parties expressly declared they "shall be taxed as costs and paid by the losing party." Thus the agreement clearly negatives the idea that his fees should be deemed a common law claim or enforced as such. They were to be taxed as costs and paid as costs; that is, they were to be taxed as the other costs were to be taxed, and to be paid as the others were to be paid. Such was the clear intention of the parties. The plaintiff was the losing party, and these fees were filed in the office and entered on the record in manner and form substantially like the arbitrators' fees. Why then, shall not due effect be given to the agreement? It cannot be objected that there was no more formal taxation of them, for that was caused by the plaintiff's own act. In so far as the arbitrators could control, or indicate the amount of these costs, they did so. It is not now contended that the sum returned was not correct for the services rendered, under the agreement. In a common law submission the arbitrators may award costs for a precise sum and subjoin it to the award: *Hewitt v. Furman*, 16 S. & R., 135. It is there said "it seems to have become the settled law in England, that in a suit pending, the arbitrators, unless otherwise stipulated in the submission or directed by law, may award costs and they are taxed by the officers."

It is, however, urged that the agreement of the parties cannot make services performed or expenses incurred in the case, taxable costs which are not so made by statute. We think the contrary is fully sustained by the authorities.

Huling v. Drexel, 7 Watts, 126, was a case of *scire facias* on a mortgage wherein the mortgagor agreed on non-payment of the debt thereby secured a *scire facias* might issue to recover the principal and interest "and all costs, charges and expenses of every kind" to which the

mortgagee might be put by reason of default in the payment. In the court below a judgment was recovered for \$147.33 for costs and charges. In this court the right to recover therefor was distinctly affirmed if there had been the slightest proof to sustain it; but inasmuch as there was no evidence of such costs and expenses the judgment was reversed. Since then it has been repeatedly ruled that the maker of a bond or note is bound by his agreement to pay attorneys' commissions for collecting in case he makes default in the payment. It has been questioned whether they must enter into and form a part of the body of the judgment, or whether they may be indorsed as costs on the execution. The former view was taken in *Mahoning County Bank's Appeal*, 8 Casey, 158; *Robinson v. Loomis*, 1 P. F. S., 78, and *McAllister's Appeal*, 9 Id., 204.

In *Schmidt & Friday's Appeal*, 1 Norris, 524, the judgment was on a single bill filed, authorizing an attorney's commission of five per cent. It was held the indorsement of the commission on the execution, although informal, was not material and should be paid out of the proceeds of real estate sold on which the judgment was a lien. Thus, in either aspect of the case, the obligor by his agreement makes that costs which would not otherwise be so. He unites it to the principal debt so that no separate action need be brought to enforce its payment. It is enforced either as an integral part of the judgment, or as a necessary incident thereto.

It is objected that giving these fees the effect of other costs, tends to abridge the right of appeal and defeat a trial by jury. This may be conceded. A party, however, may by his agreement wholly deprive himself of a right of appeal and even of a writ of error: *Andrews v. Lee*, 3 P. & W., 99; *Rodgers v. Playford*, 2 Jones, 181; *Bingham's Trustees v. Guthrie*, 7 Harris, 418; *McCahan v. Reamy*, 19 Casey, 535; *Shisler v. Keavy*, 25 P. F. Smith, 79; *Watson v. Weller*, 10 Norris, 385. It follows that he may undoubtedly clog or check the enjoyment of a right which he may wholly waive.

The fact that after the appeal was taken, there was a more specific taxation of these costs verifying the entire accuracy and correctness of the amount set forth on the record when the appeal was entered, does not change the case. The item was legally there, and with full knowledge thereof, the plaintiff declined to pay what the law required to perfect his appeal.

Judgment affirmed.

GORDON and TRUNKEY, JJ., dissent.

For plaintiff in error and below, *Messrs. A. Wiedman and R. E. Stewart.*
Contra, S. Schoyer, Jr.

CROWLEY v. IRVIN.

A father sold his daughter a mare. They resided together on his farm, and there was no apparent change of ownership in the animal. *Held*, that the unity of residence made requisite a more notorious delivery, and that the offspring of the mare could be levied on under an execution against the father.

Evans v. Scott, 8 Norris, 186, distinguished.

It is not error under such circumstances for the court to take the case from the jury.

Error to the Court of Common Pleas of Huntingdon county.

In 1857 John McCombe took title, as trustee for his daughter Eliza, to a sand quarry. In 1873, upon settling his account with her as to this property, it was found that he owed her \$3,200, and, in partial discharge of this indebtedness, he gave her a dun mare, and took credit to the amount of \$100. The father and daughter lived in the same house at the time, and the animal remained in the stable as before, but the former never afterwards made any claim of ownership or control. In 1875 Eliza McCombe was married to Daniel Crowley, but continued to reside with her father. The mare died about this time, leaving a mare colt eighteen months old. In 1877 an execution was levied against the personal property of McCombe, under which everything was sold to Mrs. Crowley except the mare and a colt which she had lately dropped. McCombe then leased his farm to Crowley and wife who took possession at once. A few months later, under an *alias fieri facias*, the mare and colt were sold as the property of McCombe, and Crowley and wife brought this action against the sheriff.

Under instruction by the court the jury brought in a verdict for the defendant.

The charge was to the effect that there had not been a sufficient delivery as against creditors, and that the fact that the daughter claimed and called the mare her own had no significance which would indicate ownership inconsistent with the possession of the father, inasmuch as she lived in his house, and had all the privileges and benefits of a daughter. This was assigned for error as well as the admission of some evidence under objection.

For plaintiff in error, *Messrs. R. B. Petrikin and M. M. McNeil.*

Contra, Messrs. Speer & McMurtrie and John Cessna.

Opinion by GREEN, J. Filed June 20, 1881.

Upon a careful consideration of the testimony in this case we are persuaded that the action of the court below in taking the facts from the jury and directing a verdict for the defendant was right. The action was trespass against a

sheriff for seizing in execution a mare and colt as the property of a father, but which was claimed as the property of his daughter. It was alleged by the daughter that her father had sold and delivered to her another animal, the mother of the mare in suit, in 1873. The payment of the price, \$100, was by the father giving to the daughter an acknowledgment in writing that he had collected \$3,200 rent for her, which he promised to pay, and on the same day giving her a receipt for \$100 for a dun mare sold to her. No money was in fact paid by the daughter, nor does it appear that any receipt was given by her to her father for the payment of \$100 on account of the obligation of \$3,200, nor that such a payment was credited thereon. At the time of the sale the father owned the real estate where they lived, and his daughter was a member of his family and lived with him. He owned and occupied the premises, and he owned and used the household goods, the stock on the farm and several other horses. The mare in question was kept in the same stable and in the same pasture with them, fed from the same rack, ate oats from the same bin, and was cared for by the father's servant, who also attended to his stock. In all these respects the usage after the sale was precisely the same as before. In point of fact no visible and no actual change took place in the possession of the mare, and she continued to be used by both father and daughter the same after as before. No witness was present at the sale, nor was any formal delivery of possession by the father to the daughter proved to have taken place. So far as the outside world was concerned, there was absolutely nothing to indicate any change of possession whatever. The verbal declarations of the father and the daughter subsequently to the sale, that the mare belonged to the daughter, are of no account in such a contention as this. They can never suffice to create title as against creditors. There could have been an actual, open, notorious delivery of possession in the presence of witnesses, but nothing of that kind ever transpired. But it is said the mare and colt in question were the natural increase of the one originally sold. That is true, but the title to the mother is the title to the offspring. If the parent mare was the property of John McCombe, as between him and his creditors, at the time the present animal was foaled, the foal was equally his, and so also was the progeny of the foal. It is also said that John McCombe, on August 16, 1877, made a lease of his farm to his son-in-law and daughter, and that thereafter the entire property, real and personal, was in the possession of the lessees. The *feri facias*, under which the mare and colt in question were

sold, was levied on August 29, 1877, thirteen days after the date of lease. So far as any testimony printed in the paper-book is concerned, we can find none which indicates that the visible possession was in the least degree changed after the execution of this lease. The father, daughter and son-in-law lived together thereafter precisely as they had before. The lease was not placed on record. It was not witnessed, nor was it acknowledged. It does not appear that any human being knew of its existence except the parties to it. Surely it could not be permitted that the mere execution of such a paper should of its own force suffice to change the title to personal estate as against the creditors of the lessor, where there was no change in the actual, visible possession.

The facts of this case are such that no extended examination of authorities is necessary. The case of *Evans v. Scott*, 8 Norris, 136, chiefly relied upon by the plaintiffs, is much short of the requirements of their case. There the actual possession of the premises in which the carpets were laid was as much the possession of the vendee as of the vendor, and the decision was put upon that ground. On page 138, PAXSON, J., says: "The house in which the carpets were put down was in the joint occupancy of the two brothers. It was the home of each, and each contributed to the payment of the rent." Of course, in such circumstances, there never was a time when the exclusive possession was either really or apparently in the vendor. But here the actual possession was originally in the vendor, and there never was a change in the apparent possession, and hence, as to his creditors, there was no change of title. This disposes of the first four assignments, and we see no error in those which remain.

Judgment affirmed.

JOHN W. SEAMAN, Defendant Below, v. THE COMMONWEALTH OF PENNSYLVANIA.

The owner of a store who permits his clerk to sell for him on the Lord's day, commonly called Sunday, as well as the clerk, is liable to the penalty imposed by the Act of Assembly of April 22, 1794, and its supplements.

Certiorari to the Court of Common Pleas, No. 2, of Allegheny county.

This was a summary conviction and before Alderman John Allen, of the Nineteenth ward, Pittsburgh, under the Act of Assembly of April 22, 1794, and its supplement of April 26, 1855.

The evidence showed that the place of business was open and a clerk was selling. The defendant, Seaman, was present part of the time.

The alderman adjudged the defendant guilty and imposed the penalty provided, thereupon

defendant issued a *certiorari* out of the Court of Common Pleas, No. 2. After argument in that court, Judge WHITE, on March 5, 1881, affirmed the judgment of the alderman, filing the following opinion:

"We reversed the judgment in No. 280 because there was no evidence that Seaman authorized his clerk to open his store on the Sabbath referred to, in that case, or knew that the store was open. But in this case the evidence was, that he was present in the store on this Sabbath. It is incredible that the clerk was selling on this day without his knowledge and authority; he was there present, when the store was open to the public, thus carrying on his worldly business, besides he had been prosecuted only a few days before that (in No. 280) for selling on Sunday. It is very clear he was there carrying on his business, knowing he was violating the law. The evidence was amply sufficient to prove that he was carrying on a worldly business, prohibited by the law."

On the 23d of March, 1881, Seaman appealed to the Supreme Court and obtained a writ of *certiorari*.

On the argument the following cases were cited by appellant's attorneys: *Commonwealth v. Nesbit*, 10 Casey, 403; *Johnston v. Commonwealth*, 10 Harris, 106; *Commonwealth v. Jeandell*, 2 Grant, 510; *Commonwealth ex rel. Barr v. Naylor*, 10 Casey, 86; *Commonwealth v. Cane*, 2 Pars. It was argued that Seaman could not be convicted for an act done by his agent, even though done by his knowledge and consent.

The appellee did not furnish a paper-book, but filed a motion to quash the appeal, assigning as a reason therefor that appellant's remedy was by writ of error and not by appeal. In support of this view it was argued that after the proceedings were removed from before the alderman, they were then "according to the course of the common law," and the remedy was error: *Commonwealth v. Betts*, 26 P. F. S., 471, and *Same v. Burkhart*, 12 Harris, 133, and other authorities were cited in support of this motion and also as bearing upon the case on its merits. No disposition was made of the motion to quash.

For appellant, Messrs. J. S. Strickler and J. P. Hays.

Contra, J. McF. Carpenter, Esq.

PER CURIAM. Filed October 17, 1881.

The offense is sufficiently charged in the information. The finding of facts by the alderman is clear, full and specific, and brings the case within the statute. The evidence showed the place of business was kept open on Sunday

and an employee was selling cigars. The plaintiff in error was present a part of the day and the conclusion is fully justified that the business was carried on with his knowledge and by his authority. The principal, as well as the clerk, was liable under the statute.

Judgment affirmed.

JONES AND WIFE'S APPEAL.

A railroad was so constructed as to stop the business of a ferry company for an average of ten days in each year. Held, upon bill filed, that the injury was not such as would warrant the granting of a perpetual injunction.

Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county.

Appellants, owners of a ferry and ferry right across the Ohio river, having a landing upon the south side of said river, prayed that the Pittsburgh and Lake Erie Railroad Company should be restrained from constructing their railroad upon piles, driven so close to the south bank of the river, as at high stages of water to prevent the use of their landing, and thereby to stop the business of the ferry. The relief sought was that the company should construct its road over the landing of plaintiffs, so that the lowest chord of the road-bed shall be at an elevation of fifteen feet above a fifteen foot stage of water in the Ohio river, and that a span or unobstructed space of one hundred and seven feet along the line of the road, and of the above elevation, shall be left thereunder.

The case having been referred to a master, he found that it was impracticable to construct the railroad at the plaintiffs' landing at a greater elevation than that complained of, and that plaintiffs had an adequate remedy at law, and recommended that the bill be dismissed.

The court in its opinion, approved the finding of the master that it was impracticable to construct the railroad at the height desired and showed that to grant the relief asked, it would be necessary to decree the destruction of the railroad at this point, and that this would not be admissible unless the injury to plaintiffs was of the gravest character. The opinion concludes thus:

"It would appear from the testimony taken by plaintiffs that when the Ohio river is at a height of fifteen feet and upwards, traffic by the plaintiffs' ferry will be substantially at an end, by reason of the present construction of defendant's road, and it would further appear that 'the river has been fifteen feet high on an average of four times a year during the last thirty years.' As well as we can learn from the testimony, this stage of the river does not continue longer than three days at any time, and many

times not longer than a few hours. The injury to the plaintiffs, then, consists in a stoppage of the business of the ferry for an average of about ten days in each year.

"As nothing has been shown to cause us to believe that this cannot be ascertained at law, and compensated in damages, in our judgment the case presented by plaintiffs will not permit this court, under the facts established, to interpose in the manner that would be necessary to afford the relief desired. The bill must therefore be dismissed with costs."

For appellants, *J. M. Caldwell, Esq.*

Contra, J. H. McCreery, Esq.

PER CURIAM. Filed October 24, 1881.

We affirm this decree upon the master's opinion and the opinion of the court.

Decree affirmed and appeal dismissed at the costs of the appellants.

BOLSTER et al. v. BISMARCK BUILDING & LOAN ASSOCIATION.

It is competent to show by parol that a written assignment of a leasehold as collateral security for an indebtedness was so written by mistake and that it was really absolute, and this as against a purchaser at sheriff's sale, without notice.

B bought at sheriff's sale a leasehold as the property of W. If at that time, B knew that W had assigned the leasehold as collateral security to his creditor, B bought subject to such assignee's rights, and could not recover in ejectment from the assignee in possession, so long as his claim remained unpaid.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Ejectment by plaintiffs in error to recover a leasehold which they claimed to have bought at sheriff's sale as the property of one Weinman. The association defended on several grounds. They claimed that Weinman had assigned the leasehold to them, and that the assignment was absolute, though by mistake the writing stated it was given as collateral security for Weinman's indebtedness to them. They also contended that, whether the assignment was absolute or as collateral, they had taken possession of the premises thereunder prior to the sheriff's sale, and they further alleged that the plaintiffs, prior to the sale, knew that Weinman had assigned the leasehold to them.

The first assignment of error was to the admission of evidence tending to show mistake by the scrivener in writing the assignment, by which it failed to state that the assignment was absolute.

The second was to the admission of evidence tending to show knowledge of plaintiffs of the

contents of the assignment, prior to the sheriff's sale.

The other principal assignment was to the instruction that if plaintiffs, when they bought, knew that Weinman had transferred the property to the association as collateral security for his indebtedness to them, the plaintiffs knew that they were buying subject to the rights of the association, and if the indebtedness was yet unpaid, they could not recover.

For plaintiff in error, *Messrs. A. E. Weger and John H. Kerr.*

Contra, Messrs. J. S. Cook and R. B. Petty.

PER CURIAM. Filed October 24, 1881.

The evidence admitted and complained of in the first and second assignments of error was evidently admissible to show mistake in the assignment—that it was absolute, and not as collateral security as appeared on its face—and to show that the plaintiffs in error knew of the mistake. It is unnecessary to examine the remaining assignments to the answers to the points and the charge. We are of opinion that these instructions were entirely correct and the case was properly submitted to the jury.

Judgment affirmed.

HENRY LEVY v. LORENZ ROSENFELD.

A security recited an assignment of a certain estate and provided that the consideration was due and payable when the assignee shall receive the money by virtue of said assignment out of the said estate and not before that time. *Held*, that this clause fixed the date of payment and not the fund out of which payment was to be made, and that upon the settlement of the estate, the consideration became payable whether the assignee received anything thereout or not.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Rosenfeld, by writing, assigned his interest in a certain estate to Levy. By a subsequent writing, dated February 8, 1879, reciting the former, it was provided, that "It is further understood by and between the said parties, that there is a balance now due from the said Henry Levy, of the consideration mentioned in said assignment, of \$500, which is due and payable when the said Henry Levy shall receive the money by virtue of said assignment, out of the said estate of Jacob A. Rosenfeld, deceased, and not before that time."

The court instructed the jury that if they found that the proper Orphans' Court had made final distribution of the estate of Jacob Rosenfeld, "then the time had come when Mr. Levy was to pay the sum of \$500 to Mr. Rosenfeld, under the agreement of February 8, 1879," and

that so far as this payment was concerned, it did not matter whether Mr. Levy received anything from the estate or not. This instruction constituted the first and only material assignment.

The second assignment set forth in substance the instruction of the court upon another point, but failed to give the court's language.

For plaintiff in error, *Messrs. Frederick Luty and J. M. Friedman.*

Contra, Joseph Crown, Esq.

PER CURIAM. Filed October 24, 1881.

The errors assigned are not sustained. The only one important to notice is the first as to the construction by the learned judge below of the article of agreement between the parties, dated February 8, 1879. We think he was entirely right in that construction.

The second assignment is not *secundum regulam*, and would not have been available to the plaintiff in error if it had been properly framed. He has entirely failed to convict the court below of any error. *Judgment affirmed.*

In Re VACATION OF DIVISION STREET.

In *certiorari* upon road proceedings, the only questions that arise are the jurisdiction of the court and the regularity of the proceedings.

In such cases, this court has nothing to do with the findings of the court below as to the merits of the controversy.

Certiorari to the Court of Quarter Sessions of Allegheny county.

Petition to vacate Division street in the borough of Sewickley, supposed to have been filed under the local Act of 10th May, 1871. The proceedings thereupon were taken under the Act of May, 1854. A view and review were had, and testimony taken.

The court held that the facts necessary to support the prayer had not been proven and dismissed the proceedings and refused the petition.

For appellants, *Messrs. McCreery & Erskine and Whitesell & Son.*

Contra, Wm. A. Stone, Esq.

PER CURIAM. Filed October 24, 1881.

This writ brings up the record upon which the only questions that arise are the jurisdiction of the court and the regularity of the proceedings. On both these points we have no doubt. They can be answered affirmatively, either under the Act of 1854 or that of 1871. With the merits of the controversy we have nothing to do. We are bound to presume that the decision of the court below was right.

Proceedings affirmed.

Court of Common Pleas,

Crawford County.

PENNSYLVANIA TRANSPORTATION COMPANY v. THE PITTSBURGH, TITUSVILLE AND BUFFALO RAILWAY COMPANY.

A railroad company was insolvent and the bondholders were about to commence legal proceedings to foreclose the mortgage given by the company to secure their bonds, when upon application of the stockholders to participate in the benefits of the purchase if the property was sold, an agreement was concluded between the bondholders most of the general creditors and stockholders reciting that the company was insolvent and that the bondholders were about to foreclose their mortgage and agreeing for the protection of their mutual interest, that when the property was sold it should be purchased by trustees and organized into a new company, in which the stockholders should have the same amount of stock as in the old company, the bondholders to take new bonds secured by a new mortgage, and the general creditors, parties to the agreement, were to take deferred income bonds for their claims. The mortgage was foreclosed; the property purchased, and the company organized in conformity to the agreement. Afterwards a creditor, whose claim was not recognized, obtained a large judgment against the old company, and filed a bill in equity against the new one, alleging that the sale was fraudulent as against creditors, and that the new company took the property subject to a trust to pay the debts of the old one, and asking a judgment for the amount of the creditors' claim. *Held:*

1. That in the absence of fraud, either in procuring the sale of the property of the old company or in subverting the process on which it was sold, the proceedings being throughout adverse and hostile to the old company, a good title passed to the new company clear of all claims or trusts except prior mortgages.
2. That where no actual fraud is practiced there is no policy of the law which will prevent the stockholders joining with the bondholders and other creditors in the purchase of the property of an insolvent corporation for the protection of their mutual interests.
3. That when through insolvency the sale of properties of such vast value becomes necessary the law favors and ought to favor agreements between all classes of parties interested which tend to prevent a sacrifice of the property and the destruction of their interests.
4. Individual stockholders and the corporate entity of the company in which they hold shares are distinct and different things; and if fraud was either actually or constructively practiced, the shareholders who hold the fruits, and not the company which holds the title upon an honest, hostile and adverse sale, should have been made parties defendant to the suit.
5. The plaintiff having made application to the court wherein the foreclosure of the old company was decreed, to set aside its decree of sale upon the same grounds set forth in this bill, and that court having full jurisdiction, and having after argument on a rule to show cause, refused the application, its decree was conclusive, and this court will not again consider the subject.

The facts will sufficiently appear in the opinion of the court:

Opinion by CHURCH, P. J. Filed October 5, 1881.

This is a bill filed by the plaintiff, praying a decree for the payment of money.

There are several averments in the bill of a constructive trust, but no prayer that any trust may be decreed. If any trust can be decreed at all under the prayer, it must be under the general term "of other and further relief."

The voluminous record, pleadings and master's report, contain many things, which, to some extent at least, are irrelevant and immaterial, for all questions may be reduced to the pivotal one in the case: Was the sale of the property of the Oil Creek and Allegheny River Railway Company made with intent to delay, hinder and defraud the company's creditors of their just debts and demands, and therefore void as against such interests?

The facts, succinctly stated, are as follows: The Oil Creek and Allegheny River Railway Company owed a mortgage debt of one million and fifty thousand dollars in 1874. This mortgage was subject to a prior mortgage of the Oil Creek Railroad Company of five hundred and eighty thousand dollars, and a prior mortgage of the Warren and Franklin Railway Company for one million five hundred thousand dollars, and a prior mortgage of the Union and Titusville Railway Company for five hundred thousand dollars. The first named railroad was a consolidation of the three last named roads, and the consolidated mortgage was subsequent to the latter named individual mortgages. On the 1st day of May, 1874, the Oil Creek and Allegheny River Railway Company defaulted in the payment of its interest on the consolidated mortgage. On the 11th day of July, 1874, a receiver was placed in possession of the company's property. A bill was shortly thereafter filed in the Supreme Court for the foreclosure of the mortgage, which after a decree made, was subsequently set aside for want of jurisdiction. On the 26th of July, 1875, a bill was filed in the Circuit Court of the United States for the Western District of Pennsylvania, by Thomas H. Dudley, against the Oil Creek and Allegheny River Railway Company for the foreclosure of the consolidated mortgage. And on the 18th of September, 1875, upon full hearing of the bill and answer a decree was made for the sale of the railroad property, and the estate, appurtenances and franchises of said company. On the 6th of January, 1876, upon a return made that the property had been sold to Thomas H. Dudley, the sale was confirmed by the said court. After the sale, and pursuant to the Act of the 8th of April, 1861, Purdon's Digest, 290, the per-

sons, for and on whose account said property was purchased, proceeded to erect themselves into a corporation, and took upon themselves the name and title of "The Pittsburgh, Titusville and Buffalo Railway Company."

The Pennsylvania Transportation Company, this plaintiff, having recovered a judgment in the Common Pleas of this county, on the 28th of April, 1876, against the old Oil Creek and Allegheny River Railway Company, filed this bill against the new corporation, praying a decree for the payment of such judgment, amounting in the aggregate to nearly two hundred thousand dollars, alleging that the property and franchises of the latter company, which had been purchased at the foreclosure sale, and which formed this company, defendant, was a trust fund for the payment of the debts of said Oil Creek and Allegheny River Railway Company; that the foreclosure sale was fraudulent, and that the property passed to the new company in trust for and chargeable with the payment of the debt of the plaintiff.

A constructive trust is claimed by the plaintiff to arise under the following circumstances: After a default had been made on the interest of the consolidated mortgage, and the property had been placed in the hands of a receiver, and a bill filed by the trustees in the Supreme Court, for the foreclosure thereof, an agreement was entered into between the bondholders, stockholders and creditors of the Oil Creek and Allegheny River Railway Company, which recited that "the holders of said bonds had concluded to proceed to foreclose said mortgage and sell the railroad property, real and personal, corporate rights and franchises covered thereby, and that the parties, therefore, for the protection of their several and respective interests in said property from great loss and sacrifice desired to unite together for the purpose of bidding at said sale of said mortgaged premises should the same be offered for sale, and for the purchasing of the same for and on their respective accounts, and to organize a new corporation, as in such cases as is by law made and provided; and that it was desirable that the parties so uniting should be the holders of the said bonds secured by said mortgage, the holders of capital stock of said company, and such other parties as have moneys owing them for materials furnished, moneys advanced, or services rendered to said company." And by this agreement the parties thereto divided themselves into three classes, bondholders, stockholders and creditors. The bondholders were to receive bonds in the new company dollar for dollar; stock was to be issued to the old stockholders in the new

company share for share; and the creditors of the old company who would sign the agreement should receive deferred income bonds at par for the debts due them. By the agreement the stockholders and creditors were to pay a certain portion into the common treasury for the payment of the expenses of the foreclosure and sale, and reorganization of the new company. All the bondholders, but a very small portion, signed the agreement. All the stockholders and all the creditors, except this present plaintiff, signed the agreement.

At the organization of the new company the terms of this agreement were fully carried out.

The stockholders of the company signed the agreement from time to time, from the 12th of April, 1875, to the 29th of December, 1875. The proceedings in the United States Court, upon which the sale actually took place, were instituted on the 26th of July, 1875, after a portion of the bondholders, stockholders and creditors had signed the agreement.

If we treat the bill filed in the United States Circuit Court as an adequate and substantial continuation of the proceedings begun in the Supreme Court for the foreclosure of the mortgage the stockholders all became parties to the paper after proceedings were begun for the foreclosure and sale. If we treat the United States Court proceedings as *de novo* for all purposes, then it appears that over forty-four thousand shares out of the one hundred thousand shares of stock became parties to the agreement after the last bill was filed.

Does this state of facts raise a constructive trust, which can by any possibility inure to the benefit of this plaintiff? The master finds, and there is ample evidence to justify it, and there is no exception to his so finding, that the default in the payment of the interest by the Oil Creek and Allegheny River Railway Company, on the 1st of May, 1874, and the subsequent semi-annual defaults made before the foreclosure proceedings, were the result of actual inability of the corporation to pay the interest and was not fraudulent, either in law or in fact. That the foreclosure of the railway company's property took place consequent upon such default upon a bill filed in a court having full jurisdiction of the parties and the cause of action.

There can be, therefore, no constructive trust arising from actual fraud committed by any party. A constructive trust may arise either from actual fraud or from that which the law presumes to be fraud because it contravenes some rule established by public policy for the protection of society.

Is there any allegation in the bill or fact

proven which violates any rule of public policy or any obligation of trust?

I cannot agree with the master, wherein he finds that the agreement hereinbefore recited (and which is "Exhibit A," in plaintiff's bill, but throughout the master's report is called "Exhibit E,") is an agreement of sale, purchase and distribution. It is an agreement of purchase and of legal distribution, pursuant to an Act of Assembly, but it is not an agreement of sale. The foreclosure and sale was under the exclusive jurisdiction of the United States Court, and was so decreed, and throughout that record not the faintest allusion is made to the agreement of purchase and distribution. As has been shown, the decree was actually made for the sale before the agreement had been signed by all the parties to it; and the decree cannot in any just sense be said to be ancillary to the agreement, as suggested by the master; nor, indeed, can the agreement itself be said to be ancillary to the decree of foreclosure and sale. It was simply a provision for the forming of a new company, which is required to be done by the Act of Assembly above alluded to.

An agreement such as this is has been and ought to be favored in law and equity. The sale of great railroads and such other corporations has been of late more or less frequent, and the interests are too great to have it said that one man can become the purchaser of such vast property without the aid of his fellow co-existing creditors. A syndicate for the purchase of such property is almost necessary for a full accomplishment of the purposes intended to be gained by a sale. If the agreement had not been signed the sale would have been proceeded with and the extinction of the old company would have followed just as certainly as it has done with the agreement. Indeed, it seems that the general creditors were more generously treated than they had a hope to expect.

It is said that the stockholders had no right to agree to become purchasers at the sale. There is no such binding relations existing between stockholders of a company and the corporation as would prevent them in equity from becoming the purchasers at a judicial sale of the corporate property. Even directors may do so, if the sale be fair and for an adequate price; and they are really trustees for the stockholders. How much rather then ought stockholders to be permitted to purchase their property, provided it be done fairly and without fraud. The agreement provides that they shall pay into a common treasury a certain sum, which it seems was an adequate consideration for the property.

The property sold for the sum of one hundred

thousand dollars. It has been suggested that this was a nominal sum. It will be borne in mind that the property was sold subject to three prior mortgages, amounting in the aggregate to over two and one-half millions of dollars, and there was evidence before the master that the property was not worth more than these fixed liens. How then can the sale be said to have been for a nominal sum?

As further evidence that there was no actual intent to delay, hinder or defraud any of the creditors of the company, it appears that at the time of the institution of the proceedings to foreclose, and at the time of the decree of sale, and even at the time of sale, and for a long time thereafter, the Pennsylvania Transportation Company had no judgment or other liquidated claim against the Oil Creek and Allegheny River Railway Company which was recognized by their debtor. There is no evidence, indeed, that the Pennsylvania Transportation Company as a creditor ever asked leave to become a party to the agreement of purchase, and that they were refused. *Non constat* if they had, it would not have been granted them, and they would have fared as other general creditors of the Oil Creek Company.

If this sale had taken place without the existence of this agreement, it will not be contended but that the new company took this property free and discharged from any and all debts of the old one.

Has this agreement developed or raised any constructive trust? I cannot think that it has, and, indeed, if it did, ought not the remedy sought by this plaintiff to be enforced, to be only against the parties to it, and ought not the stockholders who signed the agreement, and who participated in its benefits to have been made to respond as *cestuis que trust*.

These individual stockholders are one thing, and the corporate entity of the defendant is another.

The case of *Howard v. The Railroad Company*, in 7 Wallace, so much relied upon by plaintiff is a very different one in its facts, and even there the stockholders themselves, or rather the committee of stockholders were made parties to the bill. And, moreover, if the sale and this agreement, and all the facts taken in consideration therewith, did raise a constructive trust, has this plaintiff a right to have declared that the whole property of the defendant is a trust fund for the payment of plaintiff's debt?

The decree as sought here to be enforced against this defendant, would put the plaintiff in a very much better position than any other creditor of the old company.

Another thought suggests itself: The master among other things found that the receiver of the old company had turned over to the new company a sum of money of which at least fifty-eight thousand six hundred and fifty-two dollars and ten cents belonged to the creditors of the old company. He says this notwithstanding the Supreme Court had passed upon and confirmed the account of the receiver, in paying over that sum of money. If the receiver was justified in paying it over to the new company, and not justified in retaining it as against the debts of the old company, it would seem that the proper prayer for relief in this case, if the plaintiff has any relief at all, and which we have shown he has not, would be that that fund so as alleged wrongfully diverted should be made to respond to the payment of the plaintiff's judgment, and not the whole property of the defendant company. But that is not asked for in the prayer, nor was it in the prayer for the finding before the master, or in the argument before this court.

The defendant set up another defense which is not wholly without merit: During the pendency of the foreclosure proceedings in the United States Circuit Court, the Pennsylvania Transportation Company, claiming to be a creditor of the Oil Creek and Allegheny River Railway Company, presented its petition to the United States Circuit Court, setting up substantially what it does here, and praying the court that they might be permitted to take defense in the proceedings, and for the vacation of the decree and sale. That petition, after having been argued at length before the court, was dismissed. It is true, we do not know upon what grounds; but, if the United States Circuit Court had jurisdiction or power to interfere at the instance of the Pennsylvania Transportation Company, on any grounds, is it a violent presumption to suppose that they interfered on the grounds of want of equity in the petitioner's case, and for reasons which would be fatal to this present bill, even if it had merit otherwise? If a court of equity had jurisdiction over the parties and over the questions involved in the controversy, its decrees thereupon were conclusive.

There are other exceptions to the master's admissions of evidence and finding of facts that might well be animadverted upon: The evidence of the Auditor-General's Report, and the value of stock in the stock market of Philadelphia, seem to be totally irrelevant and immaterial; the admission in evidence of the agreement so far as regarded the signatures of the respective parties to it may have been ill-advised.

It certainly was not proven according to the common law rule of proving written documents. Nevertheless, I do not think it worth while to allude to the exceptions further, for I base my opinion upon the broad fundamental ground that no fraud, either express or implied, actual or constructive, has been sufficiently charged, or sufficiently proven as to warrant a decree against this defendant of a constructive trust, and sufficient to warrant a decree against this defendant as prayed for.

It remains to say that I do not think the defendant's contention that the plaintiff has been guilty of any *laches* in preferring his claim here has the merit contended for it.

The opinion and conclusions of the master are therefore reversed, and the bill is dismissed at the cost of the plaintiff.

For plaintiff, *Messrs. Joshua Douglass, Samuel Minor and John Henderson.*

Contra, W. R. Bole, Samuel Gustine Thompson and James D. Hancock.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 31st ult., all the Justices except Mr. Justice PAXSON being present:

PER CURIAM.

Clark v. M'Clommons. Error to the Court of Common Pleas of Erie county. Writ of error quashed.

Davis v. Brown. Error to the Court of Common Pleas of Erie county. Order affirmed.

Davenport v. Schoellkopf's Sons. Error to the Court of Common Pleas of Erie county. Order affirmed.

Wilson v. Nubbell. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

Alberstadt v. Doerner. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

Sterrett v. Rynd. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

Strong v. Burdick. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

Appeal of the German Savings Bank. Appeal from the decree of the Court of Common Pleas of Erie county. Decree affirmed and appeal dismissed at the costs of the appellants.

John D. Smith's Appeal. Appeal from the decree of the Court of Common Pleas of Venango county. Decree affirmed and appeal dismissed at the costs of the appellant.

Pittsburgh and Lake Erie Railroad Co. v. Bruce's Heirs. Error to the Court of Common Pleas of Venango county. This case is ordered to be reargued.

Therman v. Smith. Error to the Court of Common Pleas of Venango county. Order affirmed.

City of Oil City v. Morris. Error to the Court of Common Pleas of Venango county. Judgment affirmed.

Kinnear v. Gealy. Error to the Court of Common Pleas of Venango county. Judgment affirmed.

Overseers of Limestone Township v. Overseers of Licking Township. Error to the Court of Common Pleas of Clarion county. Order affirmed.

Reid v. Hartman. Error to the Court of Common Pleas of Clarion county. Judgment affirmed.

Selfert v. Herron. Error to the Court of Common Pleas of Clarion county. Judgment affirmed.

Ehwer v. Henderson. Error to the Court of Common Pleas of Lawrence county. Judgment affirmed.

Nesbit v. Clark. Error to the Court of Common Pleas of Lawrence county. Judgment affirmed.

Commonwealth v. Knox. Error to the Court of Common Pleas of Forest county. Judgment affirmed.

Woodland Oil Co.'s Appeal from the decree of the Court of Common Pleas of Forest county. Order affirmed and record remitted.

By MERCUR, J.

Wilson McCandless' Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed.

By TRUNKEY, J.

Nellis, garnishee, v. Coleman. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

Huckenstein v. Love, for use. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment against Thos. McKee reversed and judgment against defendant Huckenstein reversed and *venire facias de novo* awarded.

Cridge, et ux. v. Hare. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

By STERRETT, J.

F. Kulser v. C. R. Fendrick et al. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

Wm. Linton v. John Vogle. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

Wm. E. Dean et al. v. John L. Warnock, for use. Error to the Court of Common Pleas of Lawrence county. Judgment affirmed.

Robb's Appeal from the decree of the Orphans' Court of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

NEW BOOKS.

MANUAL OF BRACHYGRAPHY, a system of short-hand writing, founded upon the vowel sounds of the English language. By JOHN T. PORTER, Stenographer, Pittsburgh. For sale by all booksellers. Price, \$2.

This work will meet the demand for a system of short-hand capable of being used in ordinary business transactions. Being founded upon the vowels, instead of the consonants, as in other systems, it is so legible that stenographers using it can readily read each other's notes; and so brief that the author claims it exceeds in speed, by almost one-third, the most rapid of the old systems. Several young men who began to study the art under Mr. Porter's tutelage, less than six months ago, are now filling situations as stenographic correspondents in this city and elsewhere.

The author has been long and favorably known as an accomplished stenographer of the Graham and Pitman schools, and the fact that he now writes his own system with greater ease and speed, and increased legibility, is an excellent recommendation of its worth.

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O. S., Vol. XXIX. }

No. 13.

PITTSBURGH, PA., NOVEMBER 9, 1881.

Supreme Court, Penn'a.

A. J. NELLIS, Garnishee, Defendant Below, v.
C. COLEMAN, for use.

Where two men agree that each will loan a third a sum of money, one keeps and the other breaks his promise, the lender cannot compel the other promisor, as garnishee in an execution attachment, to pay to him what he had promised to loan said third person.

The general objection of "Incompetent and Irrelevant" made to the offer of a paper as evidence, does not raise the question of the sufficiency of the proof of the signatures of the signers.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Columbus Coleman, the plaintiff below, was one of several subscribers to a paper as follows:

PITTSBURGH, July 16, 1875.

At a meeting of the Board of Directors of the Tradesmen's Industrial Institute, the following preamble and resolution were adopted, to wit:

WHEREAS, It is apparent that sufficient funds cannot be raised by voluntary contributions to erect a building and provide for the incidental expense of holding an exhibition of the Tradesmen's Industrial Institute the present year; therefore,

Resolved, That we invite loans and advancements of money from members of the association and others to the aggregate amount of \$50,000, upon the following terms, viz:

No subscription to be binding unless the sum of \$50,000 is subscribed.

All sums so advanced in the nature of loans, for the purpose aforesaid, shall be repaid as soon as possible out of the income of the association from all sources, and in addition to the refunding of said principal sums, the profits made by the association for three successive years shall be paid to the individuals making said advancements *pro rata*.

Therefore, in consideration of the premises, we, the undersigned, subscribe and agree to pay to the said association, for the purpose and upon the terms aforesaid, the sums set opposite our names respectively. It is understood that said loan of \$50,000 is to consist of fifty shares of the par value of \$1,000 per share.

Signed, A. J. Nellis, Columbus Coleman, and seven others. The amount subscribed, as shown upon the paper, exceeded \$50,000. This paper was designated on the trial in the court below as "Exhibit No. 1," and called the Guarantee Fund subscription. Mr. Coleman paid the amount subscribed by him. Mr. Nellis never paid any part of his subscription, and also owed the institute upon some other accounts.

On May 16, 1876, the board of directors passed a resolution abolishing the guarantee fund, and providing a special mode of settling with those guarantors who had advanced money to the institute. In the fall of 1876 the institute wholly failed, and its buildings and franchises were sold out by the sheriff.

Mr. Coleman brought suit against the institute to recover the money he had paid it under the guarantee fund, declaring for money advanced to the institute at its request, and on June 17, 1879, obtained a judgment for \$10,993.13. Upon this judgment he issued execution attachments, summoning, *inter alia*, Mr. Nellis as garnishee. Nellis plead *nulla bona*, and upon trial of the issue thus framed, the plaintiff proved Nellis and Coleman's signatures to "Exhibit No. 1" and offered it in evidence, and defendant objected to the same as incompetent and irrelevant. The court overruled the objection and admitted the paper. The defendant requested the court to charge:

1. That the paper, "Exhibit No. 1," was a mere agreement to advance money to carry on the exposition of 1875, and that the plaintiff could not compel the garnishee to advance the money.

2. That the paper, "Exhibit No. 1," created no liability or debt to the Tradesmen's Industrial Institute, and the attaching creditor could take nothing on that account.

3. That even if "Exhibit No. 1" had created any liability, the action of May 16, 1876, was a release of the Tradesmen's Industrial Institute, and therefore there could be no recovery on account of any liability upon that paper.

4. That Coleman, having in this very action recovered upon the theory that this paper was an agreement to lend money, could not now claim it to be a subscription, and therefore could not recover as against Nellis upon it. All of which instructions the court refused and submitted to the jury to say whether the paper was an agreement to lend money or a subscription to carry on the exposition of 1875.

The jury found in the hands of the garnishee, \$11,000, bringing in an itemized verdict as follows, viz: Life membership, \$100; engravings, \$1,000; on "Exhibit No. 1," \$10,000. Whereupon the garnishee took this writ and assigned for error the admission of the paper, "Exhibit No. 1," the refusal of the points, *supra*, and submitting to the jury to find whether "Exhibit No. 1" was a subscription or agreement to loan.

For plaintiff in error, defendant below, Joel L. Bigham, Esq.

Contra, J. W. Kirker, Esq.

Opinion by TRUNKEY, J. Filed October 31, 1881.

The Tradesmen's Industrial Institute invited loans and advances from its members and others, upon terms that no subscription should be binding unless \$50,000 were subscribed; that all sums so advanced in the nature of loans should be repaid soon as possible out of the income of the association from all sources, and in addition to refunding the principal sums, the profits for three years should be paid to the persons making the advancements *pro rata*; and that the loan should consist of fifty shares of the par value of \$1,000 each. More was subscribed than was asked. Coleman and some others loaned the amounts they subscribed, but some of the parties, including Nellis, neglected or refused to make the loan.

The subscription was a mutual agreement to loan money to the corporation, and was so understood and acted upon by all parties. The instant the money was advanced it became a debt of the corporation. Whether the borrower had the right to pay it, or the lender to demand repayment, immediately, is immaterial in this action. Nor is the question in any way raised, whether a subscriber, who refused to make the loan, became liable for damages to the corporation, or to his co-subscribers. The contract was dated July 16, 1875, and within a year thereafter the company resolved to give its notes to all its creditors, discriminating in favor of those who had paid cash on the guaranty fund by contracting for a higher rate of interest. No subscriber was bound to loan on these terms. As early as March, 1876, and before the date of that resolution, Coleman brought suit for the amount he had loaned, declaring on oath it was a loan, and in due course of procedure recovered judgment. The company failed. After that resolution and after its failure, the company had not a semblance of right to demand of a subscriber that he advance the money. But aside from the resolution and failure, if by the terms of the subscription it was implied that the loan should be for three years, that time had ended before this suit against Nellis. Under the uncontroverted facts the company could recover nothing on the contract for a loan. Its creditor, by attachment in execution, has no better right.

It is urged that in equity the plaintiff ought to recover against the garnishee. This is not apparent. There was no agreement between the subscribers to pay, or to guarantee the payment of each other's loans. Coleman did not promise to pay Nellis whatever sum he should loan to the company, nor did Nellis make such

promise to Coleman. If this judgment stands Nellis will be compelled to pay another's debt, although he in nowise became surety for it. Had Nellis made the loan he could have recovered judgment in like manner as Coleman did, and would have as good right to demand judgment of Coleman as Coleman had of him. Conceding the validity of the contract between the corporation and Nellis, specific performance would not be decreed in equity, and at law the corporation could recover at most only nominal damages. Where two men agree that each will loan a third a sum of money, one keeps and the other breaks his promise, no legal principle will enable the lender to compel the other promisor, as garnishee in an execution attachment, to pay what he had promised to loan to said third person.

The construction of the contract was for the court, and it was error to submit to the jury to determine whether the amount subscribed was a debt owing to the corporation, or a loan to be made. The learned judge rightly ruled that if it was a loan Nellis did not owe anything on the contract.

The assignments of error relating to the admission of the subscription paper in evidence cannot be sustained. It is now too late to object that the handwriting of the several subscribers was not proved. At the trial the objection was "incompetent and irrelevant," and that was rightly overruled.

Judgment reversed and venire facias de novo awarded.

THE PITTSBURGH NATIONAL BANK OF COMMERCE, Defendant Below, v. GEORGE W. McMURRAY & WILLIAM McMURRAY.

Where funds have been placed in the hands of an attorney for investment, without more, the attorney becomes a trustee as to such funds.

An agreement by him to pay interest thereon until invested, changes the character of the transaction, the attorney then becomes a mere banker or debtor; he is not a trustee; he cannot be held in the dual character of trustee and debtor.

When trust money is misapplied it may be followed until it reaches the hands of an innocent holder for value,

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was a suit brought by George W. and William McMurray to recover from the National Bank of Commerce the sum of \$1,300 with interest from September 17, 1877.

On that day the McMurrays sent the sum of \$1,300 to S. B. W. Gill, their attorney, to invest for them. Gill was not at home, but his son received the money and deposited it in the Na-

tional Bank of Commerce to his father's credit, on general account.

From the testimony of one or both of the plaintiffs it appeared, they had an arrangement with Mr. Gill to pay them interest on moneys left by them with him for investment, until such times as he was able to procure a satisfactory investment for them.

The \$1,300 was received without any special agreement as to payment of interest, but plaintiff's claimed interest from the day the money was left with Gill.

On the 17th of November, 1877, one of the McMurrays called at the bank and demanded the \$1,300. On the same day a writ of sequestration was served on the bank. On November 20th the amount in bank to Gill's credit, viz: \$1,954.68, was paid over to the sheriff. This writ was afterwards dissolved and the money paid to Gill's assignee in bankruptcy.

This suit was brought against the bank by McMurrays in October, 1878, and resulted in a verdict in their favor for the full amount claimed. The defendant asked the court to charge the jury, *inter alia*, as follows:

"If the jury find that the money in question was sent to S. B. W. Gill for investment under the same arrangement as he had before that time received other moneys from the plaintiffs for investment, to wit: under an arrangement that he, Gill, was to pay interest to the plaintiffs until the money should be invested, then the verdict should be for defendant. And if the fact was, as stated by William McMurray, one of the plaintiffs, that such an arrangement was not countermanded when they sent the money claimed in this case to Gill, the presumption would be that the same arrangement was to continue in respect to said money as had been agreed upon before that time in respect to other moneys placed by plaintiffs in Gill's hands for investment."

This the court declined to do, and this refusal was assigned for error. There were several other assignments of error, but they were not sustained.

For plaintiff in error and below, *Thomas C. Lazear, Esq.*

Contra, T. Walter Day, Esq.

Opinion by PAXSON, J. Filed October 24, 1881.

The defendant's fifth point ought to have been affirmed. If, as was alleged, the money was placed in Gill's hands for investment, with an understanding or agreement that until he could find a satisfactory mortgage, he should pay interests thereon, the plaintiffs below cannot hold

him as a trustee, nor follow his deposit in the bank as trust money. As the court below negatived the point we must assume the jury would have found the facts as stated therein. The plaintiffs cannot treat Gill in the dual character of trustee and debtor. Undoubtedly the receipt by him of the money for investment, without more, would have made him a trustee. The money would have been trust-money, and if misapplied, could have been followed until it reached the hands of an innocent holder for value. But the agreement to pay interest necessarily implied the right to use the money. Interest is the price or consideration for the use of money. It follows that Gill became the mere banker or debtor of the plaintiffs, subject to the duty of investing the money in a mortgage when a suitable opportunity should occur. In the meantime he had the right to use it in any way his convenience or necessities required. When deposited in the bank it was the money of Gill, not of the plaintiffs, if the facts be as stated in the point.

The remaining assignments are without merit.

Judgment reversed and a venire facias de novo awarded.

CRIDGE et ux. v. HARE.

The mortgage of a married woman is valid, when given to secure the debt of a stranger, upon the same principle that it is when given for her husband's debt.

If a married woman be induced to give a mortgage on the representation made by her husband that it was for the purchase money of property bought by him, and it was used as security for another's debt, she may avoid it for the deceit though the mortgagee was no party thereto.

An assignee of a mortgage takes subject to all defenses arising from matter connected with its execution and use, unless he inquire of the mortgagor and learn that there are none, and a mortgagee is in no better position. If a paper be read in the presence and hearing of a person without objection on his part and rights are lost or acquired thereon he will not afterwards be permitted to say that he did not understand it.

A married woman is competent to prove the representation made to her, by which she was led to execute a mortgage, in order to show deception practiced upon her, though the mortgagee did not make the representation, nor had knowledge thereof.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Thomas Hare carried on a carriage factory and employed one Workman as his manager. On Hare's part the evidence was to the effect that he sold the factory effects to Workman's wife and that Cridge and wife gave the mortgage in suit to Hare as security for the purchase money. A bill of sale was prepared and read to Hare, Workman and Cridge, who were present for the purpose, which bill set forth the sale to Mrs. Workman for \$1,000 and further stated

"and as security for the payment of said sum of one thousand dollars, I hereby acknowledge the receipt of a mortgage from Joseph Cridge and Maria, his wife, for said sum, payable in one year from this date, with legal interest."

Mr. Hare never saw or spoke to Mrs. Cridge relating to any part of the transaction. On the other hand, Cridge testified that the sale was made to him and that he and his wife gave the mortgage to secure the purchase money.

Mrs. Cridge was placed on the stand and it was proposed to prove by her that she executed the mortgage under the belief that it was to secure the purchase money due by her husband as purchaser of this factory property, and not as security for Workman or his wife and that her information was derived from Workman and her husband. This offer was refused.

The court instructed the jury that Cridge could not be permitted to say that he did not understand the bill of sale if read in his presence and hearing, without objection, and that if the jury believed that it was so read to him their verdict should be for the plaintiff. This constituted the seventeenth assignment.

Also, that though fraud was practiced on Mrs. Cridge by Workman or her husband, if it was not done with the knowledge or consent of Hare, he was not bound by it, and that Mrs. Cridge having put the mortgage into the hands of a person who could make a bad use of it, was liable to the party to whom it was transferred. This constituted the fourteenth assignment.

The court affirmed plaintiff's point as follows: "The right of Thomas Hare to recover is not affected by any representations made to Mrs. Cridge, or by any fraud practiced upon her in order to secure her signature, unless he (Hare) was a party to such fraud and misrepresentations, or had knowledge of the same." This affirmation was the fifth assignment.

The fourth assignment was to the affirmation of the following: "A mortgage given by a married woman upon her separate estate, for the purpose of securing the debt of a stranger, is, when properly executed and acknowledged, effectual for that purpose, and is binding upon her."

For plaintiff in error, *C. S. Fetterman, Esq.*
Contra, Messrs. Brown & Lambie.

Opinion by TRUNKEY, J. Filed October 31, 1881.

A married woman may mortgage her estate for her husband's benefit, or to secure his existing debts and future indebtedness: *Haffey v. Carey*, 23 P. F. S., 431. She may borrow money on the security of her mortgage and immediately

give the money to her husband: *Daubert v. Eckert*, 9 W. N. C., 87. The right of disposition is incident to her separate property and she may sell or give it to whom she pleases; but generally she can only convey her real estate with the consent of her husband manifested by his joining in the deed. Her mortgage deed is valid when given to secure the debt of a stranger upon the same principle that it is when given for her husband's debt. She can make no binding executory contract except as authorized by statute, nor can she convey her real estate without compliance with the statutory requisites. The consideration for her deed may be valueless to herself and yet good. It has been settled that when she can convey her land she may mortgage it. Though a mortgage is often called a mere security for a debt and in many respects is so treated, yet it is the conveyance of the land, subject to an equity of redemption, executed in the same manner as an absolute deed.

Nothing on the face of this mortgage shows that it is a collateral security for another's debt. Apparently it is for a debt of the mortgagors amounting to one thousand dollars, and accords with their allegation that Cridge bought the property from Hare for that sum. The notary informed Mrs. Cridge of its contents just as it reads, when he took her acknowledgement. She neither saw the bill of sale nor heard it read. Nobody told her it was made to Mrs. Workman. There is no evidence that she had knowledge that the mortgage was not taken for her husband's debt. If the jury believed his testimony they would have found, had the question been submitted, that she was informed that Hare would sell the property to him for the mortgage and upon that she made it. Her own testimony ought to have been received when offered to prove this fact.

Hare is the mortgagee, but if in any view of the facts he should be treated as an assignee of the mortgage, the mortgagors, or either of them, may defend on the ground that it was procured by fraud, or that a fraudulent use was made of it. An assignee takes subject to all defenses arising from matters connected with the execution and use of the mortgage, unless he inquire of the mortgagor and learn that there are none. The mortgagee is in no better position. Per WOODWARD, J.: *Michener v. Cavender*, 2 Wright, 334; *Stoddart v. Ribinson*, 4 P. F. S., 386, rules that under the special circumstances in that case the loose affidavit of defense was insufficient; not that it is necessary to show that the mortgagee had knowledge that the mortgagor was induced by fraud to give the mortgage. Hare did not take on the faith of a certificate of no defense,

and, perhaps, that would not preclude defense, for he is a party in the transaction. The delivery of the mortgage by Mrs. Cridge to Waterson, Hare's representative, was of like effect as if she had delivered it to Hare, and gave no power to any party to make a bad use of it. Neither Hare nor Waterson told her a falsehood, they told her nothing of the bill of sale already made to Mrs. Workman, nor did they inquire if she knew that the mortgage was a collateral security. If she was induced to give the mortgage on the representation that it was for purchase money of property sold to her husband, she may avoid it for the deceit. We are of opinion that the instructions set forth in the fifth, fourteenth and seventeenth assignments were erroneous.

If the jury believed that the bill of sale was read in the presence and hearing of Cridge, that fact would warrant the remarks of the learned judge of the Common Pleas as to him, but by no means justify a peremptory instruction to render a verdict against Mrs. Cridge.

Judgment reversed and venire facias de novo awarded.

WILLIAM LINTON, Defendant Below, v. JOHN VOGLE.

In an appeal from the judgment of a justice, the cause of action cannot be changed nor can the demand be increased beyond the limit of the justice's jurisdiction, except so far as to embrace interest which has accrued since the institution of the suit.

A defendant is not bound to anticipate or defend on appeal against a claim which exceeds the jurisdiction of the justice, and the court cannot enter judgment on a verdict in excess of the plaintiff's claim before the justice.

After verdict the court permitted the plaintiff to amend his declaration by striking out \$500 and inserting \$100, and to remit the amount of the verdict in excess of the latter sum. *Held*, that the court had power to permit the amendment, but that it was not competent for the plaintiff to cure the defect by remitting part of the verdict, or for the court to determine that \$100 was the proper amount of damages for which judgment should be entered. The defendant had a right to insist that damages, exceeding the limit of the justice's jurisdiction, should neither be claimed nor proved, and was entitled to have the jury pass upon the question of damages.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

John Vogle brought suit against Wm. Linton, before John Byers, a justice of the peace of Allegheny county. A summons in debt and damage was issued June 25, 1879, returnable July 1, 1879. The defendant did not appear and judgment was entered in default for \$75. Plaintiff's claim before the justice, was \$75 for hindrance in working his corn crop, his potatoes, and for defendant not paling in a garden fence according to contract.

An appeal was taken by the defendant, whereupon the plaintiff filed an affidavit in which he claimed \$75 for damages sustained on a contract made by him with defendant for the working of his place on shares, defendant having failed to comply with his part of the contract, whereof the plaintiff sustained the damages above stated.

Afterwards his attorney filed an additional affidavit, in which he claimed \$75 for breach of contract for spring and fall crop of 1879, twenty acres of oats, 14 acres corn, and one acre of potatoes; for failing to furnish plaintiff with work; for refusing to furnish horses to work crop and neglecting the crops; thus rendering crops useless and worthless, and depriving plaintiff of some three months' labor, by reason of said breach of contract.

A declaration was filed in assumpsit in which the damages were laid at \$500. The defendant filed an affidavit of defense and a plea, in which, among other things, he set up want of jurisdiction in the court. Upon the affidavits and pleas the case was put at issue and tried.

Upon the trial plaintiff testified that he had entered into a contract with defendant by which plaintiff was to put in and work crops upon property of defendant during the year 1879, and that he was prevented from doing so by breach of the contract by defendant in not furnishing horses, etc., as agreed. He claimed damage, one-third of corn crop, \$46; one-third of potato crop, \$25; one-third of future fall crop, \$50; twenty-five days idle time \$25, alleging that defendant was bound to give him work when not employed in tending the farm. The whole claim, according to testimony, amounts to \$146. Defendant admitted a contract with plaintiff, but alleged that he had fully complied with it on his part, and that the plaintiff, after getting his share of the summer crops, which were good, had refused to work the corn and potatoes, which were poor, and without attempting to put in the fall crops had brought this suit, and without any just cause or excuse.

The jury rendered a verdict for plaintiff for \$140. The defendant moved for a new trial and for arrest of judgment, which was refused as follows: "May 23, 1881, on argument list and plaintiff allowed to amend his *narr.* by striking out \$500 and inserting \$100 as damages, and plaintiff now in open court remits all of the above verdict over one hundred (\$100) dollars. New trial refused and judgment direct to be entered for one hundred dollars and costs, on payment of verdict fee."

The making of the order, *supra*, permitting the plaintiff to amend his *narr.* after verdict by striking out \$500 and inserting \$100, to remit all

the verdict above \$100, and entering judgment against defendant for \$100 and costs were assigned as error.

For plaintiff in error, *Messrs. Whitesell & Son and Stagle & Wiley.*

Contra, George H. Quail, Esq.

Opinion by STERRETT, J. Filed October 31, 1881.

While it is true, in a certain sense, that on appeal from the judgment of a justice the proceedings are *de novo*, it is well settled that the cause of action cannot be changed, nor can the demand be increased beyond the limit of the justice's jurisdiction, except so far as to embrace interest which has accrued since the institution of suit. A verdict and judgment for more than that is conclusive that the action was either erroneously brought or improperly prosecuted: *Danach v. Warnock*, 1 P. & W., 21. In the present case the plaintiff's demand, before the justice, was seventy-five dollars damages for breach of contract, and for that sum he obtained judgment from which defendant appealed. In his affidavits filed in court, setting forth more fully the contract and breaches thereof, he claimed the same amount with interest from July 1, 1879. Thus far the record exhibits a cause of action clearly within the jurisdiction of the justice; but the declaration, containing the common counts, to which is added an inartificially drawn special count on the verbal contract, lays the damages at five hundred dollars. This might and should have been amended, by leave of court, so as to bring the case properly within its jurisdiction; but, without offering to do so, the plaintiff proceeded to trial and having introduced testimony tending to prove the allegations contained in the special count and items of damage, exceeding in the aggregate the jurisdiction of the justice, a verdict was rendered in his favor for one hundred and fifty dollars, nearly twice the amount demanded by him on the hearing before the justice and subsequently in his affidavits of claim. The plaintiff in error could not be thus called upon to defend against a claim for damages, the items of which in the aggregate, as shown by the testimony as well as the verdict, greatly exceeded the jurisdiction of the court on appeal. He was not bound to anticipate or defend against such excessive claim, nor would the court have been justified in entering judgment on the verdict as rendered. The result was a mis-trial, and the verdict should have been set aside or judgment arrested; but, after verdict the court permitted the plaintiff to amend by striking out \$300, and inserting \$100 as damages, and then upon his

remitting all of the verdict in excess of \$100, judgement was entered for that amount. In this we think there was error. While the power of the court to authorize the amendment cannot be questioned, the circumstances were not such as to justify the entry of judgment for one hundred dollars. Inasmuch as the defendant was not bound to anticipate or defend a claim for damages exceeding \$100, the verdict was invalid, and judgment thereon for the amount found by the jury would have been irregular and illegal. Nor was it competent for the plaintiff to cure the defect by remitting part of the verdict, or for the court to determine that \$100 was the proper amount of damages for which judgment should be entered. The defendant below had a right in the first place to insist that damages, exceeding the limit of the justice's jurisdiction, should neither be claimed nor proved, and in the next place he was entitled to have the jury pass upon the question of damages. The plaintiff, in his original demand supported by his own oath on the hearing before the justice, and in the affidavits of claim afterwards made in court by himself and his attorney, fixed his damages at seventy-five dollars. There is no good reason why he should have judgment for more than that sum with interest. It is not to be presumed that the plaintiff undervalued his own claim. If the declaration had been amended before or during trial, and the testimony as to the damages had been kept within proper bounds, we would not feel disposed to disturb the judgment, but, as it is, we are of opinion that it cannot be sustained.

Judgment reversed and venire facias de novo awarded.

FAULKNER'S APPEAL.

Where a building and loan association purchases land and gives its bond and mortgage for the purchase money, takes possession of the land and lays it out into building lots, and the contract is *ultra vires*, upon a judgment recovered on the bond, the lien and execution will be restricted to the land sold.

The Act of 17th June, 1878, validating such sales, does not render valid the contract for the unpaid purchase money, upon the association surrendering the land and putting the parties in *statu quo*.

The contract is unexecuted so far as the enforcement of the collection of the unpaid purchase money, but executed so far that the association will be estopped from seeking to recover back the money actually paid.

Appeal from the decree of the Court of Common Pleas, No 2, of Allegheny county.

Bill in equity by R. Munroe, Receiver and Trustee of the American Building and Loan Association, and for its stockholders and creditors against Daniel Ahl, Charles Reed and W. A. Faulkner, praying for a decree to have sale

of real estate declared void, to compel respondents to refund the portion of the purchase money paid, and for injunction to restrain respondents from proceeding to collect the unpaid purchase money beyond levying on the land sold. The material facts in the case are as follows:

On the 14th day of June, 1873, Daniel Ahl sold to the American Building and Loan Association about fifty acres of land, near Haysville, Allegheny county, for \$400 per acre. He received therefor \$4,000 in cash and the bond and mortgage of the association for \$8,000, payable in five equal annual installments with interest. The land in question was sold subject to a purchase money mortgage of \$8,000, given by Ahl to Jacob Fetter, the payment of which the association assumed. The association took possession and laid out the land into building lots. It never made sale of any part of the land so far as appears in the case. No part of the first mortgage was ever paid, either by Ahl or the building and loan association. The association paid \$6,400 and interest on its mortgage to Ahl, leaving the fifth installment unpaid. Ahl assigned about one-half of this last installment to W. A. Faulkner, and the remainder thereof to Charles Reed. Suit was brought at No. 165 July Term, 1879, in the Court of Common Pleas, No. 2, of Allegheny county, in the name of Daniel Ahl, for use of W. A. Faulkner and Charles Reed, against the association upon the bond, accompanying its mortgage given to Ahl, to which the association filed an affidavit of defense, and the case was referred to arbitrators, who found an award in favor of the plaintiffs. The association appealed. Prior to the bringing of the suit on the bond, on the 11th of June, 1878, the association was dissolved and R. Munroe appointed receiver. On the 17th of September, 1879, before the suit on the bond was reached for trial, the receiver filed a bill in equity, praying that the sale made by Daniel Ahl to the association be declared void because the contract was *ultra vires*; that he refund the purchase money so far as received by him; that an injunction issue restraining him and the other plaintiff from prosecuting their action on the bond beyond levying on the land sold, etc., and for other equitable relief. An answer was filed and the case was referred to Willis A. Boothe, Esq., as master. The respondents contended before the master, that though at the time this purchase was made the building and loan association had no power to purchase real estate as this purchase was made; yet, that by virtue of the Act of Assembly, approved June 17, 1878, P. L., 214, confirming purchase and sales made by building and loan associations

prior to the passage of the act, the sale made in this case was validated and confirmed; and the contract of sale between Ahl and the association was an executed one, and therefore the corporation was estopped from setting up the defense of *ultra vires*. The master reported that he was of opinion that the said sale and purchase should be declared void, and that R. Munroe, as receiver and trustee of the association, be directed to reconvey to said Daniel Ahl the land in question, and that said Ahl refund to said receiver the money paid by said association to him on account of the purchase money, holding that the Act of June 17, 1878, did not validate the sale in this case, so far, at least, as the contract remained unexecuted.

The respondents filed exceptions to the master's report, and after argument, EWING, P. J., modified it, filed the following opinion and decree, limiting the lien of an execution on any judgment on the bond or mortgage to the land sold:

"The complainant offered no evidence to sustain his allegation of fraud on the part of defendants.

"The case stands on the facts that in the purchase and sale the parties acted in good faith, but that at the time the building and loan association had no power to purchase nor to bind itself for payment of the purchase money.

"What then is the effect of the remedial Act of Assembly, approved 17th of June, 1878?

"In the case of *Barr v. Gazzam et al.*, in the matter of the U. S. B. & L. Association, No. — T. 187, this court passed, *inter alia*, on the questions involved in this case. We are satisfied that the decision was correct in that case, and we do not propose to reiterate the reasons for the conclusion. We hold that the Act of Assembly validates the title of the corporation, at least so far as to enable it to hold the land, if it so elect, and to convey the title, but that aside from the liability of the land or its proceeds the Act does not validate the unpaid obligations for the purchase money. The land in this case is in better condition than when the defendants parted with the title. It is all there and they should be permitted to proceed on either their bond or mortgage to enforce payment on the land, but the lien of an execution on any judgment thereon must be limited to the land in question. But the defendants cannot be called on to repay the money already paid them."

DECREE.

"1. That the defendants, Daniel Ahl, W. A. Faulkner and Charles Reed, be forever enjoined and restrained from prosecuting their certain action brought at No. 165 of July Term, 1879, in

our said court against The American Building and Loan Association, excepting only as against the real estate described in the deed and conveyance made by said Daniel Ahl to said The American Building and Loan Association, bearing date the 14th day of June, 1873, and recorded in the Recorder's office in said county, in Deed Book, vol. 307, page 301, on account of the purchase money for which the bond sued on in said action was given; and the said defendants, plaintiffs in said action, shall be confined and limited upon any execution which may be issued upon any judgment obtained or which may be obtained in said action, to the real estate described in said deed.

For appellants, *J. S. Ferguson, Esq.*
Contra, Robert Arthurs, Esq.

PER CURIAM. Filed October 17, 1881.

We are of opinion that the purchase by the building association was *ultra vires*. Conceding that it was validated by the Act of Assembly of 1878, we agree with the court below that the contract for the unpaid purchase money was not rendered valid upon their surrendering the land and putting the parties in *statu quo*. This is precisely what is accomplished by the decree below which limits the recourse of the vendors for the unpaid purchase money to the land. So far the contract is unexecuted. So far as the purchase money was paid, the corporation can certainly not claim to avoid the contract and recover back the amount. The doctrine of estoppel fairly applies. But not as to the unpaid purchase money. We are of opinion that the decree below does exact justice between these parties.

Decree affirmed and appeal dismissed at the costs of the appellants.

W. L. PENNY v. JOHN F. JENNINGS et al.
 Appeal of JOHN F. JENNINGS.

The plaintiff before judgment assigned his claim to his attorney. After judgment the defendant sought to set-off against the judgment other judgments which he had had marked to his use. *Held*, that the equity of the assignee was superior to that of the defendant.

Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county.

The facts of this case, with the opinion of the court below, filed by STOWE, P. J., will be found in 28 PITTSBURGH LEGAL JOURNAL, 210.

For appellant, *W. K. Jennings, Esq.*

Contra, Messrs. William Blakeley and Joel L. Bigham.

PER CURIAM. Filed October 17, 1881.

A note in the hands of the defendant in a judgment against the plaintiff therein, is not

necessarily either a payment on or a set-off against the judgment: *Beatty v. Bordwell*, 10 Norris, 438. Here the appellant made the further effort to set-off judgments procured against the original plaintiff, after the latter had sold and transferred to another the judgment against the appellant. Such a set-off would have worked great injustice to the good faith purchase of the purchaser. It was justly refused.

Decree affirmed and appeal dismissed at the costs of the appellant.

THE MONTOUR RAILROAD COMPANY, Defendant Below, v. JOHN SCOTT et al.

While the cost of fencing cannot be allowed as a distinct item of damages in an action against a railroad company for damages for taking a right of way, yet how much the burthen of fencing would detract from the value of the land may be considered by the jury.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action for damages for a right of way taken by the railroad company through the land of the plaintiffs. There was a recovery and the railroad company took this writ, assigning for error the following extract from the charge of the court (STOWE, P. J.): "When you cut a farm in two pieces there is fencing, and the cost of fencing, so far as is necessary to protect the property in the hands of the plaintiff for the uses he may desire it to be put to, should be allowed. It is said in this case—some suggestions made—that people are not in the habit of fencing now-a-days as much as they used to, but it has been said by the Supreme Court in cases, that fences are a part of the damage that ought to be allowed by juries, and the practice seems to be, that people should fence their property. If they are along the line of a railroad, they cannot very well use their land, so far as the pasture is concerned, or put anything on it that has the ability to move off, and they would run the risk of trespassing upon the railroad, where their horses and cattle might be killed, for which they could receive no compensation. Therefore, I can see no reason why, in this case, the cost of fencing should not be allowed as an element of damage."

For plaintiff in error, defendant below, *Messrs. Rodgers & Oliver.*

Contra, A. M. Brown, Esq.

PER CURIAM. Filed October 17, 1881.

The only question presented on this record is whether the charge of the court was right on the subject of fencing. Whilst it is true, according to our decisions, the cost of fencing cannot be allowed as a distinct item of damage, yet how much the burthen of fencing would detract from

the value of the land may be considered by the jury. We think the learned judge below very accurately limited the consideration of the jury to the cost of fencing "as an element of damage."

Judgment affirmed.

Court of Common Pleas, No. 2.

THE COMMONWEALTH OF PENNSYLVANIA, for use, v. R. H. FIFE, JOHN BROWN, JOHN NOBLE and JAMES H. BELL.

The special Act of 19th May, 1871, P. L., 986, requiring the justification of bonds in replevin before the prothonotary, relieves the sheriff from his guaranty of the solvency of the surety and to the extent of the bond taken and approved, but he is liable for the value of the goods in excess of the amount named in it.

Per EWING, P. J.: Where it is practicable there should be some notice of the presentation of the bond given to the defendant in the replevin, before the writ is executed, so that he may have an opportunity to except to the sufficiency of the bond, either as to its amount or as to the surety.

Opinion by EWING, P. J. Filed October 2, 1881.

This is a suit on the official bond of R. H. Fife, late sheriff of Allegheny county, to recover damages for his failure to take sufficient bond in a replevin suit.

By the 11th section of the Act of 21st March, 1772, Pur. Dig., p. 1265, Sec. 3, the sheriff before executing a writ of replevin of a witness for rent is required to take in his own name a bond with a responsible person as surety in double the value of the goods distrained (such value to be ascertained by the oath or affirmation of one or more credible persons not interested in the goods or distress), conditioned," etc.

Under this act the sheriff took the risk of the sufficiency of the bond, both as to amount and the solvency of the surety. As to the amount he would perhaps be relieved if he followed the Act of Assembly in having the goods appraised, otherwise he fixed the amount of the bond at his own risk. So stands the law to-day in most parts of the State. It is now the law of the responsibility of the sheriff in this county, except so far as it is modified by the local Act of 19th May, 1871, P. L., p. 986.

That act provides that "hereafter all bonds given to the sheriff of Allegheny county, in his official capacity, as indemnity for executing writs of replevin, * * shall be justified before the prothonotary of the proper court, and when the prothonotary shall certify said justification to the sheriff, shall become the property of the successful party in the original suit, without recourse to the sheriff," etc.

This act does not authorize any other person to take the bond, nor does it in any way modify

the amount of the bond to be taken. The word *justify* in the act, as we understand it, refers merely to an examination of the solvency of the surety. It relieves the sheriff from his guaranty of the solvency of the surety—nothing more. The prothonotary has no means of ascertaining the value of the goods; the sheriff has, either by inspection and the exercise of his own judgment at his own risk, or by appraisement as pointed out in the Act of Assembly.

In this case a trick was played upon the officers and a fraud perpetrated on the defendant in the replevin.

The value of the goods was put in the *precipe* at \$50, and the prothonotary took a bond in the sheriff's name for \$100, when the goods were worth fully \$250.

Without further inquiry, except a memorandum that the bond in \$100 had been approved, the sheriff immediately executed the writ and delivered the goods to the plaintiff. This court refused to quash the writ, on the ground that if the sheriff had blundered he was responsible. The surety on the bond, as well as the principal, is insolvent.

We are of the opinion that the sheriff is responsible for the loss occurring from the insufficient amount of the bond. Is he relieved of any part of the damage by reason of the bond taken in his name and approved by the prothonotary?

Plaintiff's counsel claims that because the sheriff did not take the bond, it merely being taken and held by the prothonotary, it is not any compliance of the Act of Assembly. We do not so view the case. The course of business between the two officers at that time appears to have been for the prothonotary to take the bond in the name of the sheriff. The sheriff ratified the act by proceeding to execute the writ. The effect was the same as though the bond was first handed to the sheriff and he then presented it to the prothonotary to be justified. The serious mistake was in the sheriff trusting to the unsworn suggestion of the plaintiff in the replevin, that the goods were worth \$50 when a slight inspection would have satisfied him that they were worth four times that amount.

We are of the opinion that the sheriff is relieved to the extent of the bond taken and approved.

Where it is practicable there should be some notice of the presentation of the bond given to the defendant in the replevin, before the writ is executed, so that he may have an opportunity to except to the sufficiency of the bond, either as to its amount or as to the surety.

For plaintiff, *W. S. Wilson, Esq.*

Contra, R. B. Carnahan, Esq.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 7th inst., all the Justices being present:

PER CURIAM.

Golden v. McCullough. Error to the Court of Common Pleas of Armstrong county. Judgment affirmed.

Overseers of Plum Creek v. Overseers of South Bend. Error to the Court of Common Pleas of Armstrong county. Judgment affirmed.

Mulberger v. Keppel. Error to the Court of Common Pleas of Armstrong county. Judgment affirmed.

Ambrose v. Kittanning Insurance Co. Error to the Court of Common Pleas of Armstrong county. Judgment affirmed.

Cunan v. M'Curny. Error to the Court of Common Pleas of Armstrong county. Judgment affirmed.

Bell's Appeal from the decree of the Court of Common Pleas of Armstrong county. Decree affirmed and appeal dismissed at the costs of the appellant.

Brown's Appeal from the order of the Court of Common Pleas of Armstrong county. Order affirmed and appeal dismissed at the costs of the appellant.

Fox v. Cronshore. Error to the Court of Common Pleas of Westmoreland county. Judgment affirmed.

Guffey v. Harding. Error to the Court of Common Pleas of Westmoreland county. Judgment affirmed.

Riggs v. Flowers. Error to the Court of Common Pleas of Westmoreland county. Judgment affirmed.

Kier's Appeal from the decree of the Court of Common Pleas of Westmoreland county. Decree affirmed and appeal dismissed at the costs of the appellant.

Null's Appeal from the decree of the Court of Common Pleas of Westmoreland county. Decree affirmed and appeal dismissed at the costs of the appellant.

Smith v. Long. Error to the Court of Common Pleas of Somerset county. Judgment affirmed.

Mountain v. Mitchell. Error to the Court of Common Pleas of Somerset county. Judgment affirmed.

John D. Roddy's Appeal from the decree of the Court of Common Pleas of Somerset county. Decree affirmed and appeal dismissed at the costs of the appellant.

Williams v. Hobbes. Error to the Court of Common Pleas of Indiana county. Judgment affirmed.

Crossman's Appeal from the order of the Court of Common Pleas of Indiana county. Order affirmed and appeal dismissed at the costs of the appellant.

Byers v. Ardary. Error to the Court of Common Pleas of Cambria county. Judgment affirmed.

BY MERCUR, J.

Tobias Appel et al. v. Phillip Byers et al. Error to the Court of Common Pleas, No. 2 of Allegheny county. Judgment reversed and now judgment in favor of the defendants below (plaintiffs in error) *non obstante verdicto*. BY PAXSON, J.

Reinemann v. Robb. Error to the Court of Common Pleas, No. 1, of Allegheny county. The judgment is reversed and judgment is now entered for the defendant below upon the point reserved.

Zuck and Henry v. McClure & Co. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

Becker v. Werner. Error to the Court of Common Pleas, No. 2, of Allegheny county. The judgment is reversed and it is now ordered that judgment be entered in favor of the defendants below upon the question of law reserved.

BY GORDON, J.

Mary A. Leonard v. Sidney Fuller. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Jane Pusey v. Allegheny City. Error to the Court of Common Pleas, No. 2, of Allegheny county. The judgment of the Court below is reversed and it is ordered that judgment be entered for the plaintiff in the sum of \$12,500 the full amount of the special verdict.

Oakland Railway Co. v. Allen Thomas. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Jacob Vetter's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. The decree of the court below is now reversed and set aside and it is ordered that a redistribution be made in accordance with the foregoing opinion and it is further ordered that the appellee pay the costs of this appeal.

Fuller's Appeal from the decree of the Orphans' Court of Allegheny county. The decree of the Court is now reversed and set aside as to the surcharge in the appellant's account of \$10,000 "on account of mortgage in Homestead" and confirmed as to the balance of said account. And it is further ordered that the appellees pay the costs of this appeal. STERRETT, J., dissents.

Sarah Porter v. C. A. Hitchcock. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

Liverpool, London and Globe Insurance Co. v. Jacob Goehring. Error to the Court of Common Pleas of Westmoreland county. Judgment reversed.

Oil City Gas Co. v. H. B. Robinson. Error to the Court of Common Pleas of Venango county. Judgment reversed and *venire facias de novo* awarded.

The Ben Franklin Insurance Co. v. Flinn & Hann. Error to the Court of Common Pleas of Clarion county. Judgment affirmed.

J. D. Dangier, Trustee, v. Leonard Agnew. Error to the Court of Common Pleas of Forest county. Judgment affirmed.

BY STERRETT, J.

John H. Hare for use, v. A. W. Bedell. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed. MERCUR, J., dissents as there was amply sufficient to amend by, and the parol evidence should have been received.

John Morton et ux, v. Peter L. Weaver. Error to the Court of Common Pleas of Armstrong county. Judgment affirmed.

William Roddy's Appeal from the order of the Court of Common Pleas of Somerset county. Writ of *certiorari* quashed.

BY GREEN, J.

Burgan v. Cuhoon. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Plumer & Jones Appeal from the decree of the Orphans' Court of Allegheny county. Decree reversed at the costs of the appellee and record remitted for further proceedings. GORDON and STERRETT, JJ., dissents.

The German Insurance Co. v. The Edinburgh Furniture Co. Error to the Court of Common Pleas of Erie county. Judgment reversed.

Commonwealth ex rel. Butterfield v. McCarter. Error to the Court of Common Pleas of Erie county. Judgment reversed.

Allegheny Valley Railroad Co. v. Steele. Error to the Court of Common Pleas of Venango county. Judgment reversed and *venire facias de novo* awarded.

W. R. & F. N. Peck v. E. C. Clapp. Error to the Court of Common Pleas of Clarion county. Judgment reversed and *venire facias de novo* awarded.

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No. 14.

PITTSBURGH, PA., NOVEMBER 16, 1881.

Supreme Court, Penn'a.

HORBACH, for use of THOMAS H. PHELPS,
v. HENRY REIS.

APPEAL OF THOMAS H. PHELPS.

Since the Act of April 22, 1856, P. L., 534, before the holder of an incumbrance on real estate, which has been divided into lots and sold to various parties at different dates, can be compelled to sell in inverse order of sales, the terre-tenants asking the order must admit the lien and tender payment.

Certiorari to the Court of Common Pleas, No. 1, of Allegheny county.

Henry Reis, being the owner of forty-seven acres and eighty-two perches of land in Wilkins and Peebles township, on March 31, 1851, executed and delivered a mortgage thereon to one Abraham Horbach, which mortgage was duly recorded and afterwards assigned to Thomas H. Phelps, the plaintiff in error. Subsequently, Henry Reis divided the land into seven lots, which he sold to various parties at different dates.

Default having been made on the mortgage, a *scire facias* was issued thereon, without making the terre-tenants parties, judgment recovered on two returns of *nil* and a writ of *levari facias* issued. Some of the terre-tenants presented petitions to the court, asking for an order on the plaintiff and sheriff to sell the property in lots as laid out by Henry Reis and in the inverse order of their sale by him.

The owners of the property which they desired to have sold first were not made parties to the proceeding, the petitioners did not admit that the mortgage was a lien on their property or tender to the mortgagee the amount due thereon in accordance with the terms of the Act of April 22, 1856, P. L., 534.

The court made the order prayed for and directed the sale to be made to the inverse order of the sales by Henry Reis. This appeal was then taken.

For appellant, Messrs. Geo. W. Guthrie and F. M. Magee.

Contra, Messrs. W. P. Elliott, Slagle & Wiley and Hampton & Dalzell.

Opinion by SHARSWOOD, C. J. Filed October 24, 1881.

In *Arna's Appeal*, 15 P. F. Smith, 72, the question was on a motion to quash the appeal which was not by the plaintiff in the execution but by the terre-tenant whose land the court below had ordered to be first sold. The plaintiff below was permitted to intervene and make the motion to quash, offering to accept his debt and assign his judgment to either of the terre-tenants. The point here made was directly raised, and this court held that the ninth section of the Act of April, 22, 1856, P. L., 534, entirely suspended any course of proceeding in equity which had been pursued before. It is not easy to see how the decision could have been otherwise. Not only would it be in the truth of the Act of March 21, 1806, § 13, 4 Smith's Laws, 332, which provides that where a remedy is given or anything directed to be done by an Act of Assembly, the direction of the act shall be strictly followed, but it is abundantly evident that to sustain the old proceeding, without regard to the limitation or qualification contained in the Act of 1856, would be practically to repeal the act *in toto*. The Legislature has seen fit to enact, in order to secure the rights of the judgment creditor and to prevent any delay or embarrassment to him, that he shall have the option offered to him of accepting his debt and assigning his judgment before he can be controlled in the order in which the different tracts of land subject to his lien shall be sold under his execution. It is not for us to question the mandate of the Legislature, even if we thought it unjust or oppressive to the terre-tenant. The authority of *Arna's Appeal* is not in the least shaken by *Roddy's Appeal*, 22 P. F. Smith, 98. The order in that case simply discharged the rule. It seems the attention of the court below had not been called to the Act of 1856, and it was said in the opinion of this court: "As the court below declined to exercise their power at all or to make any order in the case, their order discharging the rule must be reversed." The case was therefore remanded to be reheard and decided according to the Act of 1856.

It is proper to remark that the petitions upon which the order was made in their case are all fatally defective in not distinctly averring that the plaintiff's judgment or the mortgage upon which it is founded is a lien on their lands. Indeed some of the petitioners expressly reserve the right to contest that point. But the words of the act confine the remedy to the real estate of the persons which are subject to a common lien. Without such lien the petitioners had no equity to interpose and arrest the proceeding of

the plaintiff to recover his debt. In that case no harm can be done to them. Their title will not be disturbed or affected by the sale and it is open to them in an ejectment by the sheriff's vendee to contest his title.

We see no ground to question the constitutionality of the Act of 1856 in its application to all proceedings after its passage. It is a modification of an existing remedy, and in no way infringes any clause in the Federal or State Constitution.

Order reversed and record remitted.

MERCUR, J., dissents from the construction given to the Act of 1856, but concurs in the judgment on the other ground.

ADAM REINEMAN, Defendant Below, v. J. HARVEY ROBB, Administrator, to use.

Reineman purchased coal, in *situs*, of Robb, an administrator, paid one-half the price in cash, and gave his mortgage for the balance. He entered into an arrangement with Bell and Tiernan, whereby it was agreed in writing that they were to own one-half of the coal, and he the other half, he to hold the title. Bell and Tiernan covenanted to pay the mortgage. Bell paid the money to the mortgagee, but instead of having the mortgage satisfied procured an assignment of it and subsequently assigned it to a bank in which he was a director. On a suit brought for the use of the bank against Reineman, the mortgagor, *held*,

1. That the covenant of Bell and Tiernan to pay the mortgage standing alone would not amount to payment by the mortgagor, but coupled with the fact of actual payment by Bell would.
2. That as Bell's covenant bound him to pay the whole mortgage he had no equity which would justify him in keeping it alive to compel contribution from Tiernan, or for any other purpose.
3. That the bank took the mortgage, subject to the equities between the mortgagor and mortgagee.
4. That, under the facts, the principle that the assignee of a mortgage does not take it subject to the equities between the mortgagor and a prior assignee of the mortgage, does not apply.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action on a mortgage in the court below by J. Harvey Robb, administrator of Benjamin Morrow, for use of A. S. Bell, now for use of the Pittsburgh Bank for Savings against Adam Reineman. On the trial the plaintiff offered in evidence to sustain the issue on his part, mortgage Adam Reineman to J. H. Robb, administrator of Benjamin Morrow, dated October 20, 1866, recorded November 10, 1866, in vol. 69, page 94 for \$2,705.98, payable in one year with interest. Assignment of the mortgage, dated November 16, 1867, by J. H. Robb, administrator, to Algernon S. Bell, recorded December 9, 1867. Assignment of same, by Algernon S. Bell, to the Pittsburgh Bank for

Savings, December 9, 1867, on the record of the mortgage.

Affidavit of claim, so far as not denied by the affidavit of defense, to wit: "The liquidation of the amount, \$3,580, with interest from December 1, 1873, and the fact that the Pittsburgh Bank for Savings, the present use plaintiff, is a purchase for a valuable consideration."

It was conceded by both parties on the trial, that the \$3,580, the amount claimed by the plaintiff, included the interest up to the date of the affidavit, January 30, 1878, when suit was brought. This amount, with the accrued interest to the time of trial, made the amount of the verdict. The mortgage was upon a tract of coal underlying the farm of the said Benjamin Morrow, deceased, containing 54 acres and 19 perches, which coal had been sold by his administrator by order of the Orphans' Court to the said Adam Reineman, who paid one-half cash and gave this mortgage for the balance of purchase money.

The defendant, to sustain the issue on his part, gave in evidence the following agreement between himself and the said Algernon S. Bell and one John M. Tiernan, dated December 14, 1866:

"It is agreed hereby between the undersigned that they jointly own the coal underlying the farm of the late Benjamin Morrow, in Scott township, Allegheny county, Pennsylvania, sold to Adam Reineman by J. Harvey Robb, administrator of said Benjamin Morrow, at Orphans' Court sale, upon the 6th day of last October. The aforesaid coal is fifty-four acres and nineteen perches (54—19) and is to be owned one-half by Adam Reineman and the other half by John M. Tiernan and A. S. Bell; but the deed for it is made to Adam Reineman.

"Adam Reineman has paid the one-half of the purchase money, amounting to twenty-seven hundred and five 98-100 dollars, and given his bond and mortgage for the balance, payable in one year; said bond and mortgage are dated the 20th day of October, A. D. 1866.

"John M. Tiernan and A. S. Bell are to pay the said bond and mortgage when it becomes due; and they hereby agree to pay the same promptly when due.

"The coal aforesaid is to be held by the parties hereto, and to be sold for joint benefit when they think it advisable to sell it, and can be done with profit to the undersigned.

"We do hereby agree to the above for ourselves, our heirs, executors, administrators and assigns. Witness our hands and seals this fourteenth day of December, 1866."

Defendant also proved that the above agreement was in the hand-writing of the said Alger-

non S. Bell, and that his signature thereto, as also those of Adam Reineman and John M. Tiernan, were genuine.

Defendant also proved by D. E. McKinley, who was the treasurer of the Pittsburgh Bank for Savings in the fall of 1867, and had charge of the books, that A. S. Bell was at that time one of the directors of said bank, and that D. W. and A. S. Bell were the solicitors of the bank at that time. That no inquiry was made of Reineman or his agent, by the bank at the time of its purchase of this mortgage from A. S. Bell. That no certificate of "no defense" was furnished to the bank. That A. S. Bell paid the interest on this mortgage regularly to the bank up to December 31, 1873, at the rate of nine per cent. That the mortgage was extended one year, and marked so on the books of the bank. That the bank made no demand of Reineman for payment until after December 31, 1873, when Mr. Graham, a director of the bank, told Mr. Reineman it was a little singular that a man of his financial standing should have a mortgage of that amount running so long, and that Mr. Reineman expressed surprise.

It was also proved that the bank had no knowledge of the agreement between Reineman and Bell, until after it purchased the mortgage from Bell, and after Mr. Graham had spoken to Reineman about the mortgage.

The defendant also on the trial tendered to the plaintiff a deed of himself and wife to the bank and also a Quit Claim deed from A. S. Bell and wife and John M. Tiernan to the bank, as an offer to transfer to the bank the interest of Bell and Tiernan in the premises embraced in the mortgage, upon the bank entering satisfaction upon this mortgage.

There being no material facts in dispute, it is admitted that the case turns upon the effect of the written agreement between Reineman and Bell, above stated, made before the bank purchased the mortgage from Bell, without notice of that agreement, and without inquiry from Reineman and without his knowledge.

The court directed the jury to return a verdict for the plaintiff subject to the opinion of the court on the question of law reserved, to wit: "Whether under all the evidence, which is undisputed the plaintiff is entitled to recover and subsequently entered judgment on the verdict, COLLIER, J., filing the following opinion:

"The following facts are undisputed in this case:

"1. That Adam Reineman, the defendant, on the 20th of October, 1866, executed the mortgage in suit to J. Harvey Robb, administrator of Benjamin Morrow, deceased.

"2. That on the 16th day of November, 1867, Robb, the administrator, assigned on the margin of the recorded mortgage, the same to A. S. Bell; and that on December 9, 1867, the same mortgage was assigned of record by Bell to the Pittsburgh Bank for Savings, the present holder.

"3. That A. S. Bell, who sold the mortgage to the Pittsburgh Bank for Savings, was a director of said bank at the time of said sale and was present thereat.

"4. That one the 14th day of December, 1866, an agreement in writing was entered into between Reineman, the defendant, and A. S. Bell and John M. Tiernan, in which Reineman agreed to hold in trust, etc., certain lands therein described, for the said Bell and Tiernan; and the said Bell and Tiernan covenanted to pay this mortgage, which agreement was not recorded; nor had the bank any notice of it, except such as may be inferred from the fact of A. S. Bell being a director at the time the bank purchased the mortgage and being present at the time of the purchase.

"5. That if the bank had made inquiry at Mr. Reineman's place of business, it would have ascertained the existence of the agreement between Reineman and Bell and Tiernan.

The agreement between Reineman and Bell and Tiernan, set up as a defense, not having been recorded, did not lie in the chain of title under which the bank claimed as a purchaser under the recording acts; and therefore it could not be charged with *constructive notice*. Nor do we think that the fact that A. S. Bell was a director at the time the bank purchased the mortgage, and was present thereat, is sufficient to charge the bank with notice: *Custar v. Thomas*, 9 Barr, 27.

But it is contended that the bank was bound to make inquiry of Reineman, whether he had any defense to the mortgage. It is true that the bank, by not making inquiry, took the risk of equities, failure of consideration and set-off between the mortgagor and mortgagee: *Downey v. Thorp*, 13 P. F. Smith, 322; *Taylor v. Gitt*, 10 Barr, 431.

But we think it clear by the authorities that the bank was not bound to make inquiry as to equities between Reineman and Bell, the first assignee: *Blair v. Mathiott*, 10 Wright, 283; *Downey v. Thorp*, *supra*.

But it is further contended that the agreement between Reineman and Bell and Tiernan was a payment of the mortgage by Reineman. We do not so regard it. We think at most it was a covenant by Bell and Tiernan to pay the mortgage, and then they to become absolute owners of the land.

We are therefore of the opinion that the bank having given value for the mortgage, is entitled to recover.

The fact that deeds for the interest of Bell and Tiernan were tendered by the defendant upon suit being brought on the mortgage, and that Bell from time to time paid to the bank interest on the mortgage, are not material. Let judgment be entered for the plaintiff on the verdict.

The entry of this judgment was assigned for error.

For plaintiff in error, defendant below, *Messrs. J. L. Koethen and C. Hasbrouck.*

Contra, Messrs. C. Magee and Sutton & Plumer.

Opinion by PAXSON, J. Filed November 7, 1881.

The Pittsburgh Bank for Savings, the equitable plaintiff below, purchased the mortgage in controversy from A. S. Bell, who was assignee of the mortgagee, without inquiry to the mortgagor, and without obtaining from him a certificate that he had no defense to the mortgage. In thus taking the mortgage without inquiry, the bank took the risk of a defense by the mortgagee. This principle has been so frequently ruled that it is needless to cite the cases. It is equally well settled, however, that the assignee of a mortgage takes it subject only to the equities between the mortgagor and the mortgagee, and not the equities between the mortgagor and a prior assignee of the mortgage: *Blair v. Mathiott*, 10 Wright, 262; *Downey v. Thorp*, 13 P. F. Smith, 322.

Had the bank made inquiry of Reineman, the mortgagor, prior to taking the assignment from Bell, it would have learned that the mortgagor was given by Reineman in part payment of a tract of coal which he had bought from the estate of Benjamin Morrow, deceased; that subsequently he entered into an arrangement with the said A. S. Bell and one John M. Tiernan, by which the said coal was to be held by Reineman for the joint benefit of the three, the agreement reciting that "one-half is to be owned by Adam Reineman, and the other half by John M. Tiernan and A. S. Bell; but the deed for it is made to Adam Reineman;" that he, Reineman, had paid the entire purchase money, one-half, \$4,500 in cash, and the other half by giving the mortgage in controversy; that Bell and Tiernan had covenanted to pay the mortgage as soon as it became due; that Bell did pay the money to the mortgagee, but instead of having the mortgage satisfied of record, procured an assignment of it, and subsequently assigned it to the bank.

We are of opinion that these facts amount to

payment by the mortgagor. Of course the mere covenant by which Bell and Tiernan bound themselves to pay the mortgage, standing alone, would not be sufficient. But we have the additional fact that Bell actually paid the mortgagee, and paid him with the money of the mortgagor; that is to say, with the unpaid purchase money left by Reineman in the hands of Bell and Tiernan for that very purpose, and which they had jointly covenanted to so apply. It was therefore a payment by Reineman by the hands of Bell. The act of Bell in taking an assignment of the mortgage to himself was a fraud. His covenant bound him to pay the whole of the mortgage and he has no equity which would justify him in keeping it alive to compel contribution from Tiernan, or for any other purpose.

The foregoing facts were in the direct line of the title of the bank and inquiry of the mortgagor would have disclosed them. They were equities between the mortgagor and the mortgagee, and the principle ruled in *Blair v. Mathiott* and *Downey v. Thorp* does not apply.

The judgment is reversed and judgment is now entered for the defendant below upon the point reserved.

W. F. ZUCK and J. B. HENRY, Partners as ZUCK & HENRY, Plaintiffs Below, v. G. T. RAFFERTY and BERNARD RAFFERTY, Partners, Trading as McCURE & CO.

A mere notice of an intended breach of a contract is not of itself a breach. It may become so if accepted and acted upon by the other party.

Damages accruing from the breach of a contract cannot be set-off as a defense to an action commenced before the date of the breach.

Morrison v. Moreland, 15 S. & R., 61, and *Carpenter v. Butterfield*, 3 Johns' Cases, 144, approved and followed.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action in the court below by the plaintiffs in error against the defendants brought on November 29, 1879, and the defendants served the same day, to recover \$1,500 for coke furnished. It was admitted by the defendants that the amount sued for was correct, that the money was due and owing for coke delivered in October, but as a defense they alleged that they were damaged in a far greater amount by the breach of a contract on the part of the plaintiffs to deliver coke, said contract being in writing dated November 11, 1879, and beginning to run on December 1, 1879.

It was proven that the plaintiffs on November 19th, six days after the making of the contract, notified the defendants that they would not make any deliveries under it. On Decem-

ber 4, 1879, they wrote the plaintiffs they were ready to receive the coke and make payment therefor; that if shipments were not made they would buy in the open market and hold the plaintiffs responsible for any difference in price they would have to pay, etc., etc. The court left it to the jury to find whether there was a contract, a breach, and, if there was, the amount of damages sustained. They returned a verdict for the defendants and certified a balance in their favor of \$36,150.12. This writ was taken, the only error assigned being the refusal of plaintiffs' eighth point as follows:

"A notice of an intended breach of contract will operate as a breach only if accepted and acted upon by the other party, who may, if he pleases, disregard the notice and insist upon performance according to the contract, and if he does so insist upon performance he cannot afterwards rely upon such notice as a breach.

"The defendants' letter of December 4, 1879, shows that the defendants did insist upon performance by plaintiffs according to the contract; no cause of action therefore accrued to defendants until after this suit was brought, and the defendants is not entitled to set-off the damages in this action for that reason."

For plaintiffs in error and below, *Messrs. J. S. Cook and I. P. Hays.*

Contra, Welty McCullough, Esq.

Opinion by PAXSON, J. Filed November 7, 1881.

This action was commenced in the court below on the 29th day of November, 1879, and was to recover about \$1,500 for coke delivered by the plaintiffs to the defendants during the previous October. There was no serious dispute as to either the delivery of the coke or the amount; but the defendants set up as a defense the breach of a contract on the part of the plaintiffs for future deliveries of coke. To state said contract briefly, the plaintiffs had agreed to sell and deliver to the defendants the entire product of their Eldorado works, comprising forty ovens, at a fixed price per ton, and also the product of all other ovens built by them during the continuance of the contract. This contract plainly appears by the correspondence between the parties, and was finally closed on November 11, 1879. On the 19th of the same month the plaintiffs notified the defendants in writing that they would not deliver the coke. On the 4th of December, four days after the delivery was to have commenced under the contract, the defendants wrote to the plaintiffs as follows: "We beg to draw your attention to contract between us by which you agreed to furnish us the product of

the Eldorado coke works (forty ovens); also product of ovens that may be built during the continuance of the contract from December 1, 1879, to May 31, 1880, inclusive, and to advise you that we have been and are now prepared to receive the said coke under said contract. If shipments on our account are not *at once* commenced we will go into the market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract."

The defendants upon the trial below were allowed to set-off their damages by reason of the breach of the above contract, and the jury found a verdict in their favor for \$36,150. The single specification of error raised the question whether there was any breach at the time the suit was commenced.

A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiffs' notice of breach contained in their letter of November 19th, and acted upon it, there would plainly have been a breach of the contract. The plaintiffs in such case could not have relieved themselves by commencing to deliver the coke on December 1st, but must have been held to all the legal consequences of the breach. The defendants, however, on December 4th still insist upon compliance. They say "they are now prepared to receive said coke under said contract." This certainly kept the contract alive as to both parties. The plaintiffs could have gone on and delivered the coke on December 4th, in which case there would have been no breach and no damages. The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due; but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance: *Ripley v. McClure*, 4 Ex., 345; *Leake on the Law of Contracts*, 873. The promisee may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it,

and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it: *Leake on Contracts, supra*.

It follows from the foregoing principles that on November 29th, when the action was commenced below, there was no breach of the contract which the defendants could set up as a set-off to the plaintiffs' claim. Nor does it help the defendants that when the cause was tried the breach was complete. The date of the commencement of the suit is the obvious test in such cases: *Morrison v. Moreland*, 15 S. & R., 61; *Carpenter v. Butterfield*, 3 Johns' Cases, 144.

There was error in not affirming the plaintiffs' eighth point.

Judgment reversed and venire facias de novo awarded.

FRANK F. STEINER, Administrator, Defendant
Below, v. THE ERIE DIME SAVINGS AND
LOAN COMPANY.

The Act of 15 April, 1869, P. L., 30, does not change the law as it previously existed as to the competency of witnesses in actions by or against administrators, executors or guardians.

The deposit of money in a bank on general account, subject to check, with no appropriation of it to notes of the depositor in the bank, or direction to so appropriate it, is not payment of them, and a defense founded thereon by a surety on the notes, who is sued, is an equitable one, not admissible under the plea of payment.

When payment is pleaded with leave to give the special matter in evidence, an equitable defense may be introduced when the proper notice has been given.

Hawk v. Geddes, 16 S. & R., 28, approved and followed.

Error to the Court of Common Pleas of Erie county.

This was an action, in the court below, by the Erie Dime Savings and Loan Company, against Frank E. Steiner, administrator of J. G. Braun, deceased, upon two notes made by Braun and Henry Stahl. The latter kept an open account in the bank subject to check, which he overdraw on February 20, 1875, to the amount of \$300 and was called upon to make good. He gave his note for that amount signed by Braun, and on April 6, 1875, gave a like note for \$1,200, to make good another overdraft. The notes were not paid at maturity and an action was brought against Braun's executor who pleaded non-assumpsit and payment, but subsequently withdrew the former plea and went to trial on the plea of payment alone. On the trial he offered the deposition of Stahl to prove payment, which offer was rejected on the ground that the witness

was interested in the result of the suit. The objection was sustained, which ruling was the subject of the first assignment of error. He then offered the bank-book of Stahl to show that he had money on deposit in the bank and contended that the bank was bound to appropriate the deposits to the notes and that its failure to do so relieved Braun, the surety. The offer was rejected. Second assignment.

For plaintiff in error, defendant below, *Messrs. Benson and Brainerd*.

Contra, *Messrs. Henry Souther and E. L. Whittelsey*.

Opinion by PAXSON, J. Filed October 24, 1881.

The deposition of Henry Stahl was properly rejected. He was liable in event of a recovery, for the costs, and to this extent at least was interested in defeating the action. Nor was he made competent by the Act of 1869 for the provisions of said act do not apply to suits by or against administrators. This was a suit against an administrator.

The bank-book, the rejection of which forms the subject of the second specification of error, might possibly have been evidence had the pleadings stood as originally filed. But when the cause was called for trial below the defendant withdrew the plea of non-assumpsit and went to trial upon the plea of payment alone. The bank-book did not even tend to support this plea. It merely showed the deposit of money by Stahl which was subject to his check. This, in the absence of any appropriation to the notes in suit, or direction to so appropriate it, was not payment. Indeed, the defendant did not allege that it was payment, this contention being that the bank was bound to appropriate the deposits to the notes, and that its failure to do so relieved Braun, who was Stahl's security. This was an equitable defense and under all the authorities was not admissible under the plea of payment. It is sufficient to refer to *Updegraff v. Spring*, 11 S. & R., 188; *Hamilton v. Moore*, 4 W. & S., 570; *Coverly v. Fox*, 1 Jones, 171; *Holt v. Bodley*, 6 Harris, 207. The plea of payment means common law payment; actual payment. It need not be in money; it may be by the transfer of choses in action, or other property, but it must be something which is accepted as money. When payment is pleaded with leave to give the special matter in evidence, an equitable defense such as the one set up in this case may be introduced when the proper notice has been given. Such plea, with notice, operates substantially as a bill in equity, praying an injunction; admitting of any suggestion which

shows, *ex arguo et bono*, the plaintiff ought not to recover; without notice, the door is closed upon every merely equitable consideration, which falls short of technical payment: *Hawk v. Geddes*, 16 S. & R., 28.

We see no error in those portions of the charge referred to in third and fourth specifications. We were not furnished with the special act regulating the rate of interest which the corporation plaintiff might be allowed to charge and in its absence must presume the court below construed it correctly.

Judgment affirmed.

WILLIAM E. DEAN et al., Defendants Below,
v. JOHN L. WARNOCK, for use.

Under the Act of 25th May, 1878, P. L., 153, making surviving partners competent witnesses, etc., the obligee in a bond is a competent witness as to any transaction between himself and either of the surviving obligors.

Ash v. Guie, 28 PITTSBURGH LEGAL JOURNAL, 449, approved and followed.

An objection to the competency of a witness must be made before he is examined.

Error to the Court of Common Pleas of Lawrence county.

Opinion by STERRETT, J. Filed October 31, 1881.

After the death of Emery, one of the three joint obligors, this suit was brought on the bond in the name of Warnock, the obligee, to use, etc., against Dean and Stoughton, the surviving obligors. On the trial it became necessary to explain an alteration apparent on the face of the bond, and for that purpose Warnock, the legal plaintiff, was called, and, without objection, testified in substance that he received the bond from one of the obligors, but could not remember which of them, and that it is now in the same condition as when he received it. After his examination in chief was concluded and he had answered one or two questions on cross-examination the defendants interposed an objection to his competency on the ground that the suit was against them as surviving obligors. The objection was overruled and the cross-examination of the witness continued, but no additional facts were elicited on either side.

Assuming, for the present, that the objection to the witness was not too late, was he competent to testify to any transaction between himself and either of the three joint obligors? He was undoubtedly competent to testify as to what occurred between himself and either of the survivors, but not as to any transaction be-

tween himself and the deceased obligor. The fact sought to be proved by him was that the bond, in its present condition, was delivered to him by one of the three, and he so testified, but could not remember which of them delivered it. For aught he knew he may have received it from the deceased obligor; and, if so, the survivors would be deprived of the benefit of his testimony, and the plaintiff would therefore occupy a vantage-ground, gained by the death of the other joint obligor. It would be otherwise if he had testified that one or the other of the survivors had delivered the bond; for then they would be in a position to deny the fact, if it was untrue. The letter, as well as the spirit of the Act of 1869 and its supplements, is opposed to opening a door to one party that has been closed by death against the other: *Hanna v. Wray*, 27 P. F. Smith, 27. In furtherance of the principle of equality recognized in that case, the Act of May 25, 1878, provides, that in all civil proceedings, by or against surviving partners, no interest or policy of law shall exclude any party to the record from testifying to matters having occurred between the surviving partners and the adverse party on the record. In *Ash v. Guie*, 28 PITTSBURGH LEGAL JOURNAL, 449, this statute is said to be remedial and intended to enable parties, who stand on an equality, to testify, though a party in interest be dead. "Its spirit embraces the survivor of two or more who jointly contracted. If two persons jointly execute a note and one dies, in an action between the holder and the survivor this statute should apply as if the makers had been partners; otherwise the mischief is only partially remedied. Those jointly concerned in a transaction are partners in the popular sense of the word, and considering the obvious intentment of the statute it should apply in the case of a surviving partner in the popular as well as the technical sense."

In addition to this the rights and obligations of a deceased obligor, in a certain sense, devolve on the survivors. It is their duty to guard the interests of his estate as well as their personal interests. If they are compelled to discharge the joint obligation, they have a right to claim contribution from his estate; and the extent of such contribution is not always measured by the number of joint obligors. If one or more of them prove to be insolvent the contributive share of the others will be correspondingly increased. It does not follow, therefore, in this case, that by reason of having paid one-third of the bond the personal representatives of the deceased obligor are exempt from further liability.

It follows from what has been said that while the obligee was a competent witness as to any transaction between himself and either of the surviving obligors, he was incompetent to prove any transaction he may have had with the deceased obligor in relation to the bond. But, the objection to his competency came too late. He was permitted to testify fully in chief to the facts which he was called to prove. It was not until he was partially cross-examined that any objection was raised. The defendants must have known in the outset the ground of objection which they interposed after they heard what the witness had to say. They cannot thus be permitted to take the chance of obtaining testimony favorable to themselves and then upon discovering that it is against them, ask to have it excluded. The testimony in itself was both competent and relevant. If there was a valid objection to the competency of the witness by whom it was delivered, it should have been interposed at the proper time. Not having been done then, it should be considered as having been waived. There was other testimony tending to show that the bond was not altered after it was executed and delivered to the obligee. In view of the evidence, as to the execution of the instrument and explanatory of the alleged alteration, the court was clearly right in admitting the bond and submitting the case to the jury as was done.

The indorsement on the bond, "Pay to A. Patchen," over the signature of the obligee, presented no obstacle to the plaintiff's recovery. The instrument is not negotiable, and there is not a particle of evidence that it was ever assigned and delivered to Patchen or that he ever had any interest in it. The suit was properly brought in the name of the obligee. The assignments of error are not sustained.

Judgment affirmed.

For plaintiffs in error, defendants below, *Messrs. D. B. & E. T. Kurtz and Martin & Gardner.*

Contra, Messrs. Robert Gilliland and R. B. McComb.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 14th inst., all the Justices being present:

PER CURIAM.

O'Hara v. Baum. Error to the Court of Common Pleas, No. 1, of Allegheny county. Writ of error quashed.

McLaughlin v. McKee. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Bryar v. Beckett. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

H. W. Collender Co. v. Speer. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Orr v. Seiler. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Patterson v. McCarty. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Sorg's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Appeal quashed.

Straub v. City of Allegheny. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Mutual Building & Loan Association of McKeesport v. McMullen. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Ewing v. Thompson. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Morrow v. McElheny. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Patterson v. Wilson. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Appeal of The Pittsburgh, Allegheny and Manchester Railway Co., from the decree of the Court of Common Pleas, No. 2, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

Hays' Appeal from the decree of the Orphans' Court of Allegheny county. Decree amended by inserting the name of Ivy Sewalt after the name of John R. Hays and so modified the decree is affirmed and appeal dismissed at the costs of the appellants.

John D. Roddy's Appeal from the decree of the Court of Common Pleas of Somerset county. Decree affirmed and appeal dismissed at the costs of the appellant.

BY MERCUR, J.

John E. Briggs v. Erie County. Error to the Court of Common Pleas of Erie county. Judgment affirmed.

B. F. Keck et al. v. John McKinley et al. Error to the Court of Common Pleas of Clarion county. Judgment reversed.

BY PAXSON, J.

Armstrong County v. Jacob Coleman for use. Error to the Court of common Pleas of Armstrong county. Judgment affirmed.

James G. Allison v. The Commonwealth. Error to the Court of Oyer Terminer of Indiana county. The judgment is affirmed and it is ordered that the record be remitted to the court below for the purpose of execution. MERCUR, J., dissents as the jurors held opinions so strongly fixed or to disqualify them under *Staup v. Commonwealth.*

School District of Erie v. Fuess. Error to the Court of Common Pleas of Erie county. Judgment reversed.

Borlin et al. v. The Commonwealth ex rel. Wm Hille. Error to the Court of Common Pleas of Erie county. Judgment reversed and *procedendo* awarded.

Rumberger et ux. v. Golden. Error to the Court of Common Pleas of Armstrong county. The record is remitted with directions to the court below to enter judgment against the defendants for such sum as to right and justice may belong unless other legal or equitable cause be shown to the court why such judgment should not be entered.

Borlin et al. v. Commonwealth ex rel. J. M. Stewart. Error to the Court of Common Pleas of Westmoreland county. Judgment reversed and *procedendo* awarded.

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No. 15.

PITTSBURGH, PA., NOVEMBER 23, 1881.

Supreme Court, Penn'a.

JAS. G. ALLISON v. THE COMMONWEALTH.

The true rule, deducible from the authorities, in regard to the competency of jurors, in homicide cases, is as follows:

1. Where the juror entertains a fixed or deliberate opinion, no matter how formed, of the prisoner's guilt, he is incompetent; and his belief that he can try the prisoner impartially will not remove the disqualification.
2. Where the juror has formed an opinion from hearing or reading the evidence upon a former trial, he is incompetent, even if the opinion thus formed does not come up to the standard of a fixed opinion.
3. A mere opinion or impression, which is not fixed, and which is not based upon the evidence of a former trial, does not disqualify, provided the juror can act impartially, and render a verdict upon the evidence and upon that alone, uninfluenced by such previously formed opinion or impression.

Declarations made to bystanders by a person who believes he is going to die, as to the manner in which he received his wound, are competent evidence.

A written statement of what the deceased said as to the cause of his death, reduced to writing in his presence by a person who heard it, but not signed by or read to deceased, is not a "dying declaration," and, if objected to, should not be received in evidence.

Error to the Court of Oyer and Terminer of Indiana county.

The plaintiff in error was indicted for the murder, by shooting of his father, Robert Allison, was found guilty and sentenced. The first six errors assigned were overruling the prisoner's challenges for cause of jurors, Frank Fleming, Jacob Lutz, John Phillips, Jacob Wilhelm, John Patterson and John Atkinson. The facts on which these assignments are based are sufficiently stated in the opinion of the court, *infra*. The other assignments were:

7th. The court erred in admitting under the general objection of the prisoner the testimony of Thomas Lukehart, so far as it contained proof of the declarations of Robert Allison as to who shot him and the circumstances under which it was done, and this was not cured by subsequently instructing the official reporter to note upon his record that such testimony was stricken out. The attention of the jury not then or at any other time having been called to it or they instructed to disregard it in the consideration of the case.

8th. The court erred in admitting under the

standing objection of the prisoner the testimony of Ab. Hazlett, so far as it contained proof of the declarations of Robert Allison as to who shot him and the circumstances under which it was done, and this was not cured by subsequently instructing the official reporter to note upon his record that such testimony was stricken out. The attention of the jury not having been then or at any other time called to it or they instructed to disregard it in considering the case.

9th. The court on motion having directed the official reporter to note upon his record that the testimony of Thomas Lukehart and Ab. Hazlett as to declarations of Robert Allison as to who shot him and the circumstances under which it was done, erred in not calling the attention of the jury to it and informing them what testimony was stricken out, and that in the consideration of the case they should not consider it.

10th. The court erred in overruling the following motion: Counsel for defendant moves the court to strike out the evidence of all witnesses showing the declarations of the deceased under the name of "dying declarations" excepting as contained in the written paper just received in evidence upon the ground that the written evidence of his declarations is the best means of proof and necessarily excludes all other. Motion overruled and exception for defendant.

For plaintiff in error, defendant below, *Messrs. Silas M. Clark, J. A. C. Ruffner and H. K. Sloan.*

Contra, M. C. Watson, District Attorney, and Messrs. Harry White and Joseph M. Thompson.

Opinion by PAXSON, J. Filed November 14, 1881.

The first six assignments allege that the court below erred in overruling the prisoner's challenge for cause to the jurors who are respectively named in said assignments.

As all of these challenges rest upon the same principle, it will be sufficient to discuss one of them. I have selected that of the juror, John Phillips, which is believed to embody all of the objections made to either of the others.

The juror had stated on his *voir dire* that he had formed an opinion; that he believed the prisoner guilty. The prisoner's counsel then asked him this question: "That was your deliberate conviction from what you read?" Answer.—"Yes, sir, that was from what I read." The juror then proceeded to say that it would require evidence to remove that conviction from his mind, and that to this extent his judgment as a juror would be affected.

Prima facie this would disqualify the juror. A "deliberate conviction" is the equivalent of a "fixed opinion," which, according to the modern authorities, is the test: *Staup v. The Commonwealth*, 24 P. F. S., 458; *O'Mara v. The Commonwealth*, 25 Id., 424; *Ortwein v. The Commonwealth*, 26 Id., 414. It is to be observed, however, that the foregoing statement of the juror was in response to leading questions. The words were suggested by the prisoner's counsel. It is true he adopted them, but it is only fair to the juror and to the court below to turn to the cross-examination to see what he really meant when he answered the questions referred to in the affirmative. We then find the following: Q.—Have you any deliberate, fixed opinion about the case? A.—Nothing more than from what I read. Q.—Have you anything more than an impression? A.—No, sir. Q.—You have no such impression as would not yield to the evidence in the case? A.—No, sir. Q.—Could you then act as an impartial juror between the Commonwealth and the defendant? A.—It would be owing to the testimony. Q.—Your verdict would be according to the testimony? A.—Yes, sir. It will thus be seen that his cross-examination dispels the idea of his having a fixed, deliberate opinion, and explains and qualifies his previous statement. If it had appeared upon his cross-examination that the juror intended upon his examination in chief to say that he had a fixed opinion, he would have been incompetent. He would have put himself outside of the jury box so far as the trial of this case is concerned. When it clearly appears that a juror has formed a fixed opinion, as to the prisoner's guilt, he should not be permitted to say that he can act impartially. He may honestly think so, but the prisoner should not be subjected to such a risk. Jurors are but men, and are not perhaps above the average citizen either in intelligence or mental self-control, and may be affected by a previously formed fixed opinion without intending or even knowing it. Beside, few jurors are willing to acknowledge publicly that they cannot act impartially. The law wisely delivers the accused from such a peril.

Of the remaining jurors it is sufficient to say briefly, that Frank Heming expressed no fixed opinion; Jacob Lutz said he had no fixed opinion; Jacob Wilhelm said he had formed a conclusion or deliberate judgment, but the words were suggested by a leading question, and he explains upon cross-examination that it was nothing more than an "impression upon his mind" made by reading the accounts of the transaction in the newspapers; John Patterson

said he had come to a conclusion, but that it was a mere floating impression formed from what he had read; while Joseph Atkinson, the remaining juror, both upon his examination in chief and cross-examination, denied having formed a fixed opinion. Each of the jurors stated that the opinion formed was not of such a character as would influence his mind as a juror, and that he could and would give the prisoner an impartial trial. That the impressions formed would require some evidence to remove is not material. Impressions formed upon the mind necessarily remain until something occurs to remove them. This is a law of our nature, and cannot be changed by human agency. As was said in *Ortwein v. The Commonwealth*, *supra*: "That evidence would be required to change their first impressions has but little weight. Such must always be the fact, even in case of slight impressions or loose opinions. An impression once formed necessarily exists until something else changes it."

It was urged, however, that inasmuch as the opinions of the jurors were in part formed by reading the testimony taken before the coroner's jury, the case comes within *Staup v. The Commonwealth*, *supra*, where it was held that opinions formed from reading the evidence upon a former trial are more to be regarded than those which are merely based upon rumor, or upon newspaper accounts. But in *Ortwein v. The Commonwealth*, a distinction was taken between a previous trial and a hearing before the coroner. A juror who has attended a previous trial, or who has read the evidence delivered thereat, is in possession of the whole case, both what the Commonwealth alleges and what the prisoner offers by way of defense. An opinion formed from such knowledge excludes the idea of impartiality, and it would be perilous to a prisoner to allow such a juror to be sworn in the case. This is not true, to an equal degree, with preliminary examinations. They are in no sense a trial, but rather an inquiry into probable cause. As a general rule such examinations are conducted in a loose manner, but a small part of the Commonwealth's testimony given, and none on the part of the person accused. It would be going very far to extend the principle of *Staup v. The Commonwealth* to any preliminary examination whatever. The judge who tries the cause has no knowledge of such examination, or of what evidence was offered thereat, nor can he know if it will even resemble that which is about to be offered upon the trial. It would be a fruitless proceeding for the court below to go into an examination of the character of the evidence offered before the

coroner, or committing magistrate, to test the competency of a juror.

The true rule, deducible from the authorities, in regard to the competency of jurors, is as follows :

1. Where the juror entertains a fixed or deliberate opinion, no matter how formed, of the prisoner's guilt, he is incompetent ; and his belief that he can try the prisoner impartially will not remove the disqualification.

2. Where the juror has formed an opinion from hearing or reading the evidence upon a former trial, he is incompetent, even if the opinion thus formed does not come up to the standard of a fixed opinion.

3. A mere opinion or impression, which is not fixed, and which is not based upon the evidence of a former trial, does not disqualify, provided the juror can act impartially, and render a verdict upon the evidence and upon that alone, uninfluenced by such previously formed opinion or impression.

Close questions in regard to the competency of jurors may be frequently avoided by standing the juror aside. In such cases he is not called again until the panel is exhausted, which in many instances does not occur.

The publication of the evidence given at preliminary examinations in important criminal cases often seriously embarrasses the administration of justice. While such publications are eagerly sought for and read, they never benefit the community and are often productive of much harm in various ways. It is a matter worthy the consideration of the legislative department of the government whether the publication of the evidence in criminal cases should not be altogether prohibited by law.

The seventh assignment is without merit. There was no necessity of striking out the testimony of Thomas Lukehart. There is nothing in the case to show that when Robert Allison made the declaration to the witness, he did not expect to die. He was mortally wounded. His physicians had informed him there was no hope, and that he must prepare for death. He said he knew it, and told all with whom he conversed upon the subject that he would die from his injuries. There is nothing to contradict this, and the remark by the deceased to the witness when his will was being prepared, that if he got well the will would amount to nothing, does not of itself, in the face of the evidence, disclose any expectation of his recovery. The remark was perhaps natural, but altogether unimportant. What has been said under this head covers also the eighth and ninth assignments.

The tenth and last assignment alleges error

in not striking out all the oral evidence of the dying declarations of the deceased, upon the ground that the written paper offered in evidence as dying declarations, excluded such oral evidence. We see no error in this. The evidence referred to was properly received, and the paper in question cannot have the effect claimed for it. If objected to it would not have been admissible. It was but a statement of what the deceased said as to the cause of his death, reduced to writing by a person who heard it. The paper was not signed by the deceased, nor does it appear to have been read to him, or that he assented to its correctness. It might have been used by the person who wrote it to refresh his memory. Beyond this it had no value.

We find no error in this record.

The judgment is affirmed, and it is ordered that the record be remitted to the court below for the purpose of execution.

MERCUR, J., dissents, as the jurors held opinions so strongly fixed, as to disqualify them under *Staup v. Commonwealth*.

WILLIAM BALDWIN, Plaintiff Below, v. THE CITY OF PHILADELPHIA.

An ordinance of city councils regulating the salary of a city officer is not a "law" within the meaning of Section XIII, Article III, of the Constitution, which declares that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment."

A "law" is an emanation from the Supreme power and cannot originate elsewhere.

An ordinance is a mere local regulation for a city, and while it may have the force of law in a community to be affected by it, it concerns only a subdivision of the State and does not rise to the dignity of a law.

Error to the Court of Common Pleas, No. 3, of Philadelphia county.

In the court below the following statement of facts was agreed upon: "By an ordinance of the Councils of the City of Philadelphia, approved December 23, 1874, the Department of Highways, Bridges and Sewers for the City of Philadelphia was constituted, consisting of a Chief Commissioner and six Assistants. The former at a salary of four thousand (\$4,000) dollars per annum, and the latter each two thousand dollars per annum. The chief to be elected by *viva voce* vote of councils in joint convention, to serve for two years, and with power to appoint his assistants, whose duty was to superintend all work done on the bridges, culverts, sewers and highways in the City of Philadelphia, and enforce all ordinances relating to said department.

"By an ordinance of said Councils, approved the twelfth day of December, 1876, it was pro-

vided that 'the chief commissioner of highways shall hereafter be elected for the term of three years.' On January 1, 1877, the plaintiff was elected by City Councils aforesaid, in joint convention, chief commissioner of the highways for three years from that date, and re-elected in like manner on December 30, 1879, for three years. By an ordinance of said Councils, approved the nineteenth day of December, 1877, making an appropriation for 1878, to said department, item one provides (*inter alia*): 'For salaries of the officers of said department: chief commissioner, three thousand six hundred (\$3,600) dollars.' The plaintiff's salary was thus reduced during his term of office, and for the year 1878, and thereafter he received but thirty-six hundred (\$3,600) dollars per annum. By ordinance approved the thirty-first day of December, 1880, making an appropriation to the department of highways, it was provided, *inter alia*, in item one (1), as follows: "For salaries of officers of the department: Chief Commissioner forty-five hundred (\$4,500) dollars." The plaintiff's salary was thus increased during his term of service as Chief Commissioner of Highways. It is admitted that if the increase made by the above ordinance was lawful, that then the sum of three hundred and seventy-five dollars was and is due and owing by defendant to plaintiff as his salary for the month of January, 1881, and that the City has refused to pay the same. It is agreed that if the court shall be of opinion upon the facts of this case that the plaintiff is not a public officer within the meaning of Article XIII, Section III, of the Constitution of the State of Pennsylvania, so that his salary could be lawfully increased during the period for which he was elected, that then judgment shall be entered for plaintiff in the sum of \$375, and if the court shall be of opinion that he is a public officer, and that his salary could not lawfully be increased as aforesaid, that the judgment shall be entered for plaintiff in the sum of three hundred dollars."

Judgment was entered in favor of plaintiff for \$300, LUDLOW, P. J., filing an opinion and this writ was then taken. There was assigned for error: (1) Entering a decree and judgment for \$300. (2) Not entering judgment for \$375 in favor of plaintiff. (3) Deciding that the plaintiff was a public officer within the meaning of Article XIII, Section III, of the Constitution of Pennsylvania. (4) Deciding that plaintiff's salary could not be lawfully increased during the period for which he was elected.

For plaintiff in error and below, *George S. Graham, Esq.*

The commissioner of highways collects no

public moneys, but merely a part of the revenues of the City, which is for her own use, and he has charge of the repair and paving the streets under the care of the municipality.

This duty of caring for the streets is a municipal duty, imposed upon the City, and its exercise is for the benefit and advantage of the City, and is not a public duty. It is a duty for the exercise or neglect to discharge which the City is responsible to all persons injured by her negligence. And this duty, when delegated to the chief commissioner of highways, is merely a municipal duty, and he becomes a municipal agent.

His office is not created by law, but simply by an ordinance, and his salary is regulated by ordinance, and hence he is not within the prohibition of Article XIII, Section III, of the Constitution, as a municipal agent, and as his salary has been raised by an ordinance, the prohibition, "no law shall," etc., applicable only to the Legislature, does not apply to him or an ordinance of City Councils.

Contra, Messrs. C. B. McMichael and Wm. Nelson West.

Opinion by PAXSON, J. Filed November 17, 1881.

It appears from the case stated that when the plaintiff was first elected Chief Commissioner of the Highways for the City of Philadelphia the salary of the office was \$4,000 per annum. Subsequently, and during his first term of said office his salary was reduced to \$3,600. This reduction was acquiesced in by the plaintiff, no one doubting the power of Councils to make it. During his second term, Councils increased his salary to \$4,500, which increase the City declined to pay, and it forms the subject of this contention.

The court below held that the plaintiff was a public officer within the meaning of Section III, of Article XIII, of the Constitution, which declares that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

We need not discuss the question whether the plaintiff is a public officer, as it is not necessarily involved in the case. The error into which the learned judge below inadvertently fell was in applying the above section of the Constitution to this case. The language of that instrument is: "No law shall * * * increase or diminish" his salary, etc. The word "law" has a fixed and definite meaning. In its general sense it imports "a rule of action"—in the particular sense in which we are now considering it, it means "a rule of civil conduct prescribed by the Su-

preme power in the State commanding what is right and prohibiting what is wrong:" *Blackstone*. A law is an emanation from the Supreme power and cannot originate elsewhere. It is a rule which every citizen of the State is bound to obey.

The ordinance of Councils by which the plaintiff's salary was increased, is not a law, and therefore does not come within the constitutional prohibition. It is a mere local regulation for the City of Philadelphia. It has, perhaps, the force of law in the community to be affected by it, but it is not prescribed by the Supreme power; it concerns only a subdivision of the State, and does not rise to the dignity of a law.

There is no ambiguity in this section of the Constitution. It is clear and explicit. But when we consider it in connection with the other portions of the third Article, there is no room for doubt. It is the article upon "Legislation" and is very elaborate. It contains thirty-three sections and is throughout a restraint upon the powers of the General Assembly. It imposes numerous restrictions upon the mode by which laws shall be passed and prohibits legislation upon a large variety of subjects. When therefore, Section III declares that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment," the obvious meaning is that the General Assembly shall not pass such a law. There is nothing in the article, even by implication, that would justify us in extending the word "law" to the ordinances of a city. Such an interpretation would not be expounding the Constitution; it would be altering it.

The judgment is reversed, and judgment is now entered in favor of the plaintiff for the sum of \$375.

**H. W. COLLENDER COMPANY, Plaintiff Below,
v. SPEER et al.**

Where a landlord had let premises with the right in the tenant to remove the improvements, it is not competent in order to show that no rent was due and collectible when distress levied, to prove that during the lease, the landlord agreed with the tenant that, if the latter would put a building on the premises, no rent should be collectible until the cost of the building should be paid, and that the cost was not paid when the warrant was levied.

The owner of land having let the same and subsequently conveyed the land in trust, the trustee can issue a warrant in his own name for rent due, and can make avowry that the lessee was his tenant, and that he was grantee in fee of the owner.

Plaintiffs in replevin under a distress for rent, not being the lessee, cannot control in their interest, the appropriation of moneys made as between the landlord and the lessee, in the absence of any appropriation by the latter.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This case arose upon a writ of replevin, sued by the H. W. Collender Co., for certain billiard tables seized under a landlord's warrant, issued by James P. Speer, for rent due for the premises on which the goods here claimed were at the time of the seizure.

William H. Shoenberger, leased the premises to one Burdett, for the term of five years. According to the terms of that lease, Burdett had the right to remove at the expiration of his term any improvements which he should place upon the lot. Subsequently Mr. Shoenberger conveyed all his interest in this lot to Mr. Speer, in trust to collect the rents, issues, and profits thereout, and to pay them over to Mr. Shoenberger's son (George during his life, and at his death to the other heirs of General Robinson, giving Mr. Speer power to sell and convey the lot in fee simple at any time when he should deem it advisable so to do.

On the trial plaintiff proposed to prove by Burdett that Speer agreed with him (after the deed to Speer) that Burdett should erect on the premises a building, afterwards called the Coliseum, and that no rent should be collectible until its entire cost had been paid and that this had not been done when the distress was made. The rejection of this evidence constitutes the first alleged error.

The plaintiff assigned as error the admission of the warrant, because it was signed "James P. Speer," and complained of a variance between the evidence and the avowry; the latter averring that Burdett was the tenant of Speer, and that Speer was the grantee in fee of Shoenberger.

The plaintiff, having shown that in this transaction, Burdett had given Speer a judgment note for \$4,000 offered to prove that upon this judgment subsequent to the writ and pleadings in this replevin, Speer had sold and bought in for \$3,200, the Coliseum and its contents (other than the Collender tables) for the purpose of showing that the rent due by Burdett had been paid. The rejection of this offer was also assigned as error.

For plaintiffs in error and below, *Messrs. R. B. Carnahan and Josiah Cohen.*

Contra, Messrs. Geo. Shiras, Jr., and W. R. Blair.

PER CURIAM. Filed November 14, 1881.

In regard to the evidence excluded by the learned judge from the jury as complained of in the first assignment of error, we think he was entirely right. The other evidence in the cause was fairly submitted. The objection to the landlord's warrant and the avowry are answered by

Franciscus v. Reigert, 4 Watts, 98, and certainly the plaintiffs in the replevin could not control the appropriation by Speer of the amount raised by the execution on his judgment, in the absence of any appropriation by Burdett.

Judgment affirmed.

Court of Common Pleas, No. 1.

IN EQUITY.

THE COMMONWEALTH OF PENNSYLVANIA v. THE MONONGAHELA BRIDGE COMPANY et al.

The Monongahela Bridge Company was incorporated by an Act of the Legislature, passed in the year 1810, which act provided that nothing therein "shall authorize the said company to erect the said bridge in such manner as to injure, stop or interrupt the navigation of said river by boats, rafts or other vessels." The bridge was built in 1820. The company having begun the erection of a new bridge on a bill filed by the Commonwealth alleging that if erected at the high proposed it will "injure, stop, hinder and interrupt" the navigation of the river and praying for an injunction to restrain the company from so erecting it as proposed and to compel the company to erect the superstructure at such an elevation as will not injure, stop or interrupt the navigation, etc., and that when completed it shall not be less than twenty feet higher than the roadway on the present bridge. *Held*,

1. That the Court of Common Pleas has jurisdiction of the bill.
2. That the proviso in the charter is to be applied as of the present time, and with like effect as if there had not been a bridge erected before.

Application for a preliminary injunction, etc. The opinion states the facts:

Opinion by STOWE, P. J. Filed November 19, 1881.

So far as the allegations in plaintiff's bill are material to the present inquiry, they are in substance that the defendants being incorporated by certain Acts of Assembly, with authority to build a bridge over the Monongahela river at Pittsburgh, which acts provided that nothing therein "shall authorize the said company to erect the said bridge in such manner as to injure, stop or interrupt the navigation of said river by boats, rafts or other vessels," about the year 1820 erected a bridge which injures and interrupts navigation and endangers vessels and their cargoes. That the same being inadequate for the purposes of its construction, and now worn out, the defendants have projected and commenced the erection of a new bridge with a roadway about 10 feet higher than that of the old bridge. That the said bridge, if erected as contemplated, will "injure, stop, hinder and interrupt" the navigation of the Monongahela river, and that in order to the safe and free navigation of the same the roadway of the super-

structure should be at least 20 feet above the level of the present roadway and 58 feet above the datum or zero line of the river.

To this the defendants reply: 1. That it is not true that the proposed bridge will hinder, stop or interrupt the navigation in any respect contrary to the legal meaning and interpretation of the terms of the said Acts of Assembly. 2. This court has no jurisdiction of the cause of complaint set out in plaintiff's bill.

Numerous affidavits have been read on behalf of plaintiffs tending to establish the fact that the free use of the river for purposes of navigation requires an elevation of superstructure or roadway much higher than that proposed by defendants, and that an elevation of 20 feet above the present bridge can be obtained without any special interference with or injury to the convenience, interest or comfort of the public using the bridge. There is nothing in the case calling upon us to determine whether the old bridge should be abated as a nuisance. That it is a most serious interruption to navigation cannot be denied. Whether it was so when erected in 1820 we have no sufficient evidence to determine. But whether so or not, I am satisfied that a superstructure as high as now proposed by defendants would not at that time have been any practical interference with the navigation of the river.

But whatever may have been the case in 1820, or several years later, the fact is established by the affidavits that for years past the present bridge has been not only an interruption to navigation by steam-boats, such as now run, both above and below it, but that it has proved an absolute barrier to a large number of such vessels. The height to which defendants now propose to raise the new superstructure will of course greatly diminish the obstruction, but the evidence shows very clearly that it will by no means do away with it.

Captain Stockdale, manager of the line of steamers, known as the Pittsburgh and Cincinnati Packet line, says: The clear height of the largest of the five boats in the line is 85 feet to the top of the smoke stack and 55 feet to the top of the pilot house. The smallest is 55 feet to the top of the smoke stack and 35 feet to the top of the pilot house. The others vary between these figures. To allow our boats to go above the bridge it should be 20 to 25 feet higher than the present one.

Peter Sprague, a boat builder for 32 years, says: He usually builds tow-boats to run on the Monongahela, Ohio and Mississippi rivers, and has built at least fifty for the trade. That there are two classes, the smaller which are

used exclusively in the Monongahela river and harbor trade, and the larger which run below and in the Monongahela river. The average height of the smaller class is 24 to 26 feet from top of water to top of pilot house and from 40 to 45 feet to top of smoke stack, and that the average height of the larger class of tow-boats is from 40 to 55 feet from the water to top of pilot house and from 50 to 70 feet to top of smoke stack.

Thomas Smith, captain of the "Boaz," says: That his boat is engaged in towing coal-boats to New Orleans, and she is 50 feet 6 inches from water to top of pilot house and 77 feet to top of chimneys.

John L. Reno, captain of the steamer *Fred Wilson*, No. 2, says: That his boat is engaged in towing coal between Pittsburgh, Louisville and New Orleans, for O'Neil & Co., whose mines are up the Monongahela river. The height of the steamer above the water is 37 feet to top of pilot house and 60 feet 5 inches to top of smoke stacks, and that she is an ordinary sized tow-boat. To allow her to pass under the bridge with her chimneys down on a 12 feet stage of water the bridge should be 24 feet higher than at present.

M. L. Woods, captain of the steamer *Alex. Swift*, says: That his boat is engaged in towing coal-boats and barges to Louisville and points below for W. H. Brown, whose mines are up the Monongahela river. The height of the boat from the water to the top of the pilot house is 44 feet and to top of chimneys 58 feet, and to allow her to pass under the bridge at a 12 feet stage of water it should be 21 feet higher than now.

Captain Jas. McDonald says: His boat is 47 feet to top of pilot house and 61 or 62 feet to top of chimneys.

Quite a number of other witnesses also testify to the sizes of the steamers engaged on the river, showing that at high water, such as required for a good coalboating stage, the bridge should be considerably higher than defendants propose to erect it.

They generally concur in stating that good water for coalboating is not less than from 10 to 18 or 20 feet deep.

Hon. J. K. Morehead, Captain R. C. Gray and quite a number of other witnesses testify to the great damage the old bridge has done the navigation of the river, and injurious effect of any bridge that may seriously interfere with it.

The height of the proposed bridge is 47.5 feet of clear headway between datum and floor at the center of the channel-spans—which are 360 feet between center of piers or about 350 feet from pier to pier—and at the middle pier 48.5

feet. This is 11 feet 3 inches higher than the under side of the old bridge, with nearly twice the waterway. At 10 feet water this gives only 37½ feet, and at 18 feet only 29½ feet of height, which is insufficient to allow such vessels as above mentioned to pass under at the lower stage of water without lowering their chimneys, and at the higher without removing their pilot houses. It is therefore clearly shown that a large number of steamers now engaged in towing coalboats and in other business, between this city and the different points below, will be seriously interfered with and interrupted in navigating the river under the new bridge, unless it is raised at least as high as suggested by plaintiffs, to wit: with a space of not less than 56 feet 3 inches between datum and the lower surface of the superstructure or 20 feet higher than now.

The defendants have not attempted to dispute by their evidence any of the foregoing allegations, in regard to interference with navigation, but allege and produce affidavits to prove that a greater height than they propose, and particularly the height suggested by plaintiff, would not only be extremely burdensome to them by reason of an additional outlay of over \$40,000, but that the grade upon the bridge or its approaches would be so great as to seriously incommode the public, both by compelling the use of more horses to a given load and by rendering the bridge dangerous from the slipping and falling of horses. To these allegations the plaintiffs reply, that as a fact the increased elevation can be obtained by lengthening and slightly elevating the approaches and by a very inconsiderable or at least entirely practicable increase of grade on the bridge itself. That if such were not the case, and the grade could not be reduced below what is indicated by the defendants' engineer, as being consequent upon the elevation claimed by the plaintiffs, the bridge would still be as practicable and accessible as some of the most frequently and extensively traveled bridges in the United States, particularly the Market and Chestnut street bridges in Philadelphia, the bridge across the Mississippi at St. Louis, and the New Port and Cincinnati bridge at Cincinnati. While I am led to believe that it is entirely practicable to build the bridge to the height demanded by plaintiffs so that the increased grade will not be so great as to seriously inconvenience the public and so that neither it nor the approaches will be so steep that teams cannot draw over them quite as heavy a load as they can upon the generality of our streets, even admitting the difficulty which results from the grade which defendants claim it would require, I cannot see how all the damage

and inconvenience thus caused, can be allowed to prevail against the much greater injury which would be caused by the proposed bridge. If the injury was equally balanced the "proviso" should prevail. As long as any bridge can be erected which will answer the reasonable necessity of the public the limitation in the charter should not be disregarded.

These conclusions as to the injury done, as before indicated, are based upon the *present* state of navigation and not upon any condition of things existing when the old bridge was built. The question now arises, what is the proper construction of the proviso in defendants' charter as to the time to which it refers?

If we are to take *Dugan v. The Monongahela Bridge Co.*, 3 Casey, 303, as law, the question is settled. Judge WOODWARD in deciding that case, upon one of the points distinctly raised, says: "Another idea suggested, and which found favor with the court below, was, that the company was not bound to foresee the extraordinary development and increase of the coal trade upon the river as it now exists. This taken in connection with the ruling that they were empowered to build the bridge, causing as little injury and obstruction as possible to the navigation amounts to this: that however great a nuisance the piers of the bridge are now that a large business is carried on along the river, yet the company is not liable to the injured party, because thirty or forty years ago, when they built the bridge, they obstructed the trade of the river as little as possible.

"The Legislature must be presumed to have had all the natural growth of this trade in view when they authorized the bridge. The presence of coal in the land drained by the Monongahela, its value for fuel, the constantly increasing market and the dependence on this source of supply of the rapidly peopling regions south and west, were well known to the Legislature. Did they not foresee that these circumstances would increase the demand and supply, and that this great natural outlet would be needed to accommodate the producers and consumers? How can a doubt be entertained on this point, when we find them guarding the navigation by language as express and precise, as it is applicable at the present day? The true meaning of the act of incorporation is that the bridge was to be so built as not to interfere, stop or interrupt navigation either then or now, whether in its infancy or full growth."

But it is said that the authority of that case is destroyed by the later cases of *Clark v. Pittsburgh and Birmingham Bridge Company*, 5 Wright, 147, and *Kirk v. The Monongahela*

Bridge Company, 10 Id., 112, or at least so shaken as to leave the question an open one. There can be no doubt that in some substantial respects the later cases do differ from it. The case of *Dugan v. The Bridge Company* holds that a private citizen may sustain an action against the company, and maintains a literal compliance with the proviso, while the others decide that a suit can be sustained only by the Commonwealth, and indicates a more liberal interpretation of the limitation of the charter; but in neither is the decision expressly declared to be wrong or directly called in question. And there is nothing said in either, which so far as I can see, directly or by implication cast any doubt upon the ruling recited above. But even if we do not treat this as authority, how is it on principle? It may be said that when the charter was granted in 1810, steam-boats were almost unknown, and that even when it was built in 1820 steam-boat navigation was in its infancy and of small extent upon the western rivers, and that human foresight could not anticipate either its present importance or the immense size to which steamers have grown.

In 1806 Fulton built his first steamboat, called the Clermont, for use on the Hudson. It was 160 tons burden and 130 feet long. August 7, 1807, he started to Albany on his trial trip. He built another boat in 1807. Within a short time John Stevens of New York launched his boat called the Phoenix and took it around by sea to Philadelphia. He improved the speed of his boats, attaining 13½ miles per hour in 1814. In 1812 the first passenger steamer was built in Britain. In 1818 the Savannah, a New York built ship, with side wheels and propelled by steam and sails, crossed the Atlantic to St. Petersburg via Liverpool, reaching the latter place in twenty-six days and returning in safety. Thus before the bridge was erected steam navigation as a means of commerce was an accomplished fact, of which the civilized world had notice. But coming nearer home, we find that in 1811 Fulton and Livingston established a ship yard at Pittsburgh and built an experimental boat there called the New Orleans, with stern wheel and masts. Her first trip was made in 1812 to New Orleans, from which place she afterward ran to Natchez. Immediately steamboats grew into use as the only available means of ascending with vessels the rapid waters of our rivers. Even if it were unreasonable to presume that the Legislature could foresee all the growth of trade and the means of carrying it on, it certainly is not so to assume that they recognized the importance of navigable streams, the almost only means of communication in

those days, and the necessity of keeping the navigation of a river whose waters flow into the Gulf of Mexico free from interruption for all time to come.

The case of *The Commonwealth v. New Bedford Bridge*, 2 Gray, 339, shows the same construction was put upon the charter of defendant in that case in regard to the increased necessities of navigation arising from its growth after the erection of the bridge. There the charter required the bridge to be erected with two draws at least thirty feet wide and suitable to navigation.

The court say: "We think the act was framed with a wise foresight to meet future exigencies. In granting a right to build a bridge over a navigable stream and thereby create a partial obstruction to the freedom of the river, the Legislature intended to provide as far as possible against any serious interruption, present or future, to the passage of vessels, so long as the defendants should continue to maintain their structure."

Defendants are bound to conform themselves to the present exigencies of public navigation, and if they fail to do so they violate the duty imposed on them by the terms of their charter.

But even if we would not hold that such a rule applied were this a proceeding to abate the old structure, it seems to me perfectly clear that where the defendants seek to erect a new bridge under the old charter, the proviso must be applied as of the present time and with like effect as if there had not been a bridge erected before.

Having thus seen that the proposed bridge is forbidden by its charter, we are met by the question raised as to the jurisdiction of this court under the facts set out in plaintiff's bill.

Without attempting any argument or citation of authorities upon this question, I will simply say that the argument and authorities adduced by plaintiff's counsel have fully convinced me that the court has jurisdiction of this cause.

These conclusions make it apparent that we should prevent this bridge being built at the proposed height, and also that we should direct that it be not erected in such manner that the under surface of its superstructure shall be less than twenty feet above or higher than the under surface of the superstructure of the present or old bridge, for a space or distance reasonably sufficient for the safe passage of steam-boats.

Decreed accordingly.

For plaintiff, *Messrs. D. T. Watson, Knox & Reed and F. M. Magee.*

Contra, Messrs. Geo. Shiras, Jr., A. M. Brown and T. C. Lazear.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 21st inst., all the Justices except Mr. Justice PAXSON being present:

PER CURIAM.

Bell v. Lafferty. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Birmingham & Elizabeth Turnpike Road Co. v. The Commonwealth. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Reinemann v. Moore. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Simpson v. Duncan. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

Have, for use, v. Bedell. Error to the Court of Common Pleas, No. 1, of Allegheny county. Motion for reargument refused.

Woodside's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

Citizens' Passenger Railway Co.'s Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

Louisa Meyer's Appeal from the decree of Court of Common Pleas, No. 1, of Allegheny county. Appeal quashed.

Holmes v. Ihmsen. Error to the Court of Common Pleas, No. 2, of Allegheny county. Order affirmed.

Milliken v. Mitchell. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

McGough v. Birmingham. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Brickell v. Van Buren. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed.

Bohlen's Appeal from the decree of the Court of Common Pleas, No. 2, of Allegheny county. Appeal quashed.

Keeling's Appeal from the decree of the Court of Common Pleas, No. 2, of Allegheny county. Decree affirmed and appeal dismissed at the costs of the appellant.

Frank Ambrose et al. v. The Kittanning Insurance Co. Error to the Court of Common Pleas of Armstrong county. Motion for reargument refused.

By MERCUR, J.

Poor District of Beaver Township v. Poor District of Rose Township. Error to the Court of Quarter Sessions of Jefferson county. Judgment affirmed.

A. T. McDonald et al. v. S. Simeox et al. Error to the Court of Common Pleas of Venango county. Judgment affirmed.

By GORDON, J.

R. M. Dickey v. Geo. W. Garrison. Error to the Court of Common Pleas No. 1, of Allegheny county. Judgment affirmed.

Geo. H. Garber v. John G. Connor. Error to the Court of Common Pleas, No. 1, of Allegheny county. Judgment affirmed.

By PAXSON, J.

The City of Allegheny v. Black et al. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

By TRUNKEY, J.

Mackey's Heirs v. Adair et al. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

Appeal of Mary Ann McAleer, Trustee, from the decree of the Court of Common Pleas, No. 2, of Allegheny county. Decree reversed and it is now considered and decreed that

the money in court less costs of audit be paid to Mary Ann McAleer, Trustee, costs of appeal to be paid by the appellee J. C. Blindley

McCarthy et al. v. De Armitt. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment reversed and *venire facias de novo* awarded.

By GREEN, J.

Phelps v. Pittsburgh, Cincinnati & St. Louis Railway Co. Error to the Court of Common Pleas, No. 2, of Allegheny county. Judgment affirmed. SHARSWOOD, C. J., and TRUNKY, J., dissent. STERRETT, J., concurs in the judgment but dissents from the reasons given in support thereof.

McCutcheon's Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county. Decree reversed and record remitted for further proceeding, and it is ordered that the fund in the court below be distributed by awarding to Sarah Ann Wilson, executrix of John Wilson, deceased, the full amount of all premiums paid by him and by his said executrix, together with interest on such payments from the time they were respectively made and the remainder of the fund to Clarissa McCutcheon, the appellant, the costs of this appeal to be paid by the appellee.

NEW BOOKS.

THE LAW OF USAGES AND CUSTOMS, with illustrative cases. By JOHN D. LAWSON, Author of "A Treatise on the Law of Common Carriers," etc. St. Louis: F. H. THOMAS & Co. 1881.

In preparing this work Mr. Lawson has taken thirty-three leading cases to illustrate the different branches into which he divides his subject, and to each case has added foot notes and to the notes references to other cases sustaining or qualifying the principal one. The first chapter treats of the requisites to the validity of a custom or usage and contains seven cases which establish respectively that a usage must be established; a custom must be general; a usage must be known; a custom must be moral; a usage must be reasonable. To this chapter there are forty-nine notes, covering fifteen pages. The other chapters are entitled (II.) "On the Proof necessary to establish them;" (III.) "On their validity and effect on different relations and occupations" (to which there are one hundred and thirteen notes, occupying 228 pages); (IV.) "On their admissibility to explain written and other Express Contracts, and (V.) "On their Inadmissibility when in conflict with Contracts, Statutes or Laws." Exclusive of the index the volume contains four hundred and eighty-six pages, of which number one hundred and fifty are filled with the cases, and the remainder with the notes and references, which are printed in very small type. An exhaustive index occupies sixty-six pages.

Mr. Lawson's work on Common Carriers has gained for him an excellent reputation as a compiler and editor, which this treatise will greatly enhance. He has admirably succeeded in his purpose to make the book "take the

place, for the judge and practitioner, not alone of a treatise, but of the original reports of the several thousand adjudications on the law of usages and customs which it contains." The work is clearly printed on good paper and is well bound.

THE AMERICAN DECISIONS, containing the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports, to the year 1869. Compiled and annotated by A. C. FREEMAN, Esq., Vol. XXVIII. San Francisco: A. L. BANCROFT & Co., Law Book Publishers, Booksellers and Stationers. 1881.

This volume re-reports cases originally reported in the State Reports down to the year 1835. The Pennsylvania cases are taken from Fifth Rawle and Fourth Watts.

We have received the following books: *Martindale's Commercial and Legal Guide* (twenty-eighth semi-annual number) for September, 1881. It gives the names of attorneys and banks in over seven thousand places with the population of each place and how reached; designates all capitols, county seats, money order post-offices and telegraph offices; also a synopsis of the collection laws of every State, territory and province, to date, with much other information valuable to business men and lawyers. Published in March and September, by J. B. Martindale, New York and Chicago. Price, \$2.

How is Your Man? or the Sharks of Sharkville. Realities of the Graveyard Insurance Business. Published by Lee & Shephard, of Boston, and Charles T. Dillingham, New York. This little book purports to expose the practical workings of the mutual insurance business carried on in the eastern part of this State. "The (unknown) author states in the introduction that "men have already been killed for the insurance on their lives, and murders are now daily committed in Pennsylvania for the same motive." It would be idle to waste time or space in reviewing a book that in the outstart so outrageously libels the citizens of our State.

Oddities of the Law, by Franklin Fiske Heard, published by Soule & Bugbee, of Boston, contains some curious and interesting extracts from old books and reports. We quote one of them: "The Public Laws of Maryland, vol. 2, p. 315, contain the Police Act of the City of Baltimore, passed in 1860. This provides that 'No Black Republican, or indorser or approver of the Helper Book,' shall be appointed to any office under the Board of Police. The constitutionality of this act came before the court in *Baltimore v. State*, 15 Md., 376, 463. The above clause was objected to as unconstitutional; but the court held that they could not take judicial cognizance of the meaning of these words."

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PITTSBURGH, PA., NOVEMBER 30, 1881.

Supreme Court, Penn'a.

THE OIL CITY GAS COMPANY, Defendant
Below, v. H. B. ROBINSON.

The plaintiff below, Robinson, in the course of his duties as City Engineer of Oil City, entered a sewer with a lighted lantern. Gas from a broken pipe belonging to defendant company, had penetrated the sewer. An explosion took place, whereby the plaintiff received injuries of a serious character. *Held,*

1. That the company was responsible for what might, in the nature of things, occur from its neglect, and its responsibility was not limited by what its officers may have thought to be improbable or even impossible.
2. That it was bound for the consequences of its neglect, though those consequences were not, and could not, by any ordinary prudence, have been anticipated, whilst the plaintiff was bound only to a knowledge of the probable consequences of the facts of which he was cognizant and to that ordinary prudence which the circumstances required.
3. If plaintiff knew that gas was escaping and that it was probable it would find its way into the sewer in sufficient quantities to produce an explosion, he ought to have anticipated the result, and not entered the sewer with a light. And if he did so under such circumstances, it was such contributory negligence as ought to have prevented his recovery in this action.

Error to the Court of Common Pleas of Venango county.

This was an action by H. B. Robinson, a civil engineer in the employ of the city of Oil City, against the Oil City Gas Company, to recover damages for injuries resulting from an explosion of gas which had escaped from defendant's pipes and penetrated a sewer into which defendant had, in the course of his business, entered with a lighted lamp. The charge was negligence on the part of the gas company, and the defense was, first, a denial of negligence; second, contributory negligence on the part of plaintiff.

Plaintiff submitted, *inter alia*, the following points:

1. It is the duty of a gas company to lay its pipes and keep them in such a condition as to avoid injury to persons or property by the escape of gas. As the danger to be avoided is great, especial precautions must be taken to guard against it. And the mere fact that gas escaped from the pipes of a gas company, in such quantity as to be offensive or dangerous to

persons or property, is sufficient to raise a presumption of negligence on the part of the company.

Answer.—Affirmed, with this qualification— if such leakage has continued for such a length of time as to attract the attention of persons in the vicinity or passing along the street, or if the company have actual notice of such leak and do not immediately and promptly take measures to repair such leak.

4. If the jury find that oil escaped from the pipes of the Oil City Gas Company, that such leaks continued for a considerable time, that the company through its agents had notice thereof, that the gas penetrated into the sewer and there exploded, injuring the plaintiff, the company is liable for the injuries suffered, unless plaintiff by his own negligence contributed to such injury.

Answer.—Affirmed.

Defendant submitted, *inter alia*, the following points:

1. A party is answerable only for the natural and probable consequences of his acts or omissions—such consequences as might be foreseen by ordinary forecast—and is not answerable for results which are extraordinary and not likely to be foreseen.

Answer.—Affirmed, but in judging of what would be ordinary forecast and prudence, the subject matter with which the parties are dealing must be taken into consideration, and if it be of a dangerous or hazardous character, the care which is required is such as a man of ordinary prudence would use in providing against accident in the use of such material.

2. If it was natural and reasonable to apprehend that gas escaping from leaks or breaks in defendant's mains would find its way into the sewer in such quantity as to be liable to produce an explosion when a light should be brought in contact therewith, and if the plaintiff knew as he has testified, that gas was escaping from leaks or breaks in defendant's mains, and knew the condition of the sewer, and that it was probable that such gas would find its way into the sewer in quantity aforesaid, then to enter the sewer with a lighted lantern was such contributory negligence on plaintiff's part as would prevent a recovery in this action.

Answer.—Under the facts in evidence we decline to affirm this point, but submit the question of contributory negligence to the jury.

On the subject of negligence the court instructed the jury as follows:

"Negligence is the want of proper care, skill, caution and diligence, such diligence, care and caution as, under the circumstances, a man of

reason and ordinary prudence would exercise. It consists of nonfeasance, that is, omitting or not doing something which ought to be done, which a reasonable and prudent man would do.

"In misfeasance, that is, the doing of something which ought not to be done, which a reasonable and prudent man would not do under the circumstances, in either case leading to mischief or injury.

"There is another definition of negligence, and that is, that it is the absence of care according to the circumstances."

He further charged that if the plaintiff was guilty of negligence which in the slightest degree contributed to the injury, he could not recover.

Verdict for plaintiff, \$8,000, whereupon the defendant took this writ.

For plaintiff in error, defendant below, *C. Heydrick, Esq.*

Contra, Messrs. Dodd and Lee.

Opinion by GORDON, J. Filed November 7, 1881.

There is but a single one of the rulings of the court, in the case before us, with which we are inclined to find fault; as to the rest we regard the exceptions to them as not well taken. These are mainly to the instructions of the court as to the responsibility of the company for the results arising from the escaping gas. It is contended that the company's neglect in not repairing its pipe was, at most, but the remote and not the proximate cause of the accident. But to this proposition we cannot assent.

The gas pipe and sewer were in the immediate vicinity of each other; in the former there was a defect, and from it the gas, not merely by absorption or by gravity, but also by pressure, found its way into the sewer. This certainly resulted from the defendant's negligence, because but for the defective pipe there could have been no escape of the gas; and if this was not the proximate cause where, we ask, was the intervening one by which the consequences of the accident are to be shifted from the defendant to some other person or thing? That the city contractor, in building the sewer, disturbed the pipe and so caused the break, has no effect to shift the cause, for it still remains that that was the escaping gas, neither does it excuse the company if knowing the defect, it neglected to make the necessary repairs. So even if the plaintiff by his own negligence occasioned the defect, that would not make the cause less direct, though his suit might thereby be defeated on the ground of contributory negligence. The result, then, was the direct effect of the cause

stated, and the remaining question was one of negligence. In this, as in what precedes it, I, of course, speak only as of those facts which the jury have found from the evidence of the case, and not as of results flowing from admitted facts. The whole of the evidence was for the jury, and from it a second panel may come to a very different conclusion, as to the facts, from that arrived at by the one which rendered the verdict in this case.

But again, it is said the company is not liable for this accident because the penetration of the gas into the sewer was not a reasonable probability. But, to meet the defendant on its own grounds, what is there unreasonable about the probability of gas being forced from a broken pipe through three or four feet of loose earth into an adjacent sewer? Gas permeates iron, and why not earth and brick? The company was responsible for what might, in the nature of things occur from its neglect, and its responsibility was not limited by what its officers may have thought to be improbable or even impossible.

But the plaintiff was also bound to the exercise of a reasonable care for his own safety. He was a civil engineer and may be presumed to have had some knowledge of the dangerous nature of illuminating gas, of its power to penetrate the earth and the materials composing the sewer, and of its explosive character when mixed in certain quantities with common air. He certainly did know, for he so testifies, that the gas was escaping and saturating the adjacent earth, hence, it seems to us that he ought to have been upon his guard. We cannot apply one rule to the company and another to the defendant, or vary the rule as concerning negligence except in this; the defendant was bound for the consequences of its neglect though those consequences were not, and could not, by any ordinary prudence, have been anticipated, whilst the plaintiff was bound only to a knowledge of the probable consequences of the facts of which he was cognizant, and to that ordinary prudence which the circumstances required. If it was probable that the gas escaping from the leak would find its way into the sewer in quantities sufficient to produce an explosion, he ought to have anticipated the result, and not have entered the sewer with a lighted lamp. If he did so under the conditions stated, he was guilty of such contributory negligence as ought to have prevented his recovery. It follows, from this, that the court should have affirmed the defendant's second point without qualification, and for not having so done we reverse the judgment and order a new *venire*.

**TOBIAS APPEL et al., Defendants Below, v.
PHILIP BYERS et al.**

Where two nephews, one legitimate and the other illegitimate, answer to the description in a will, the legitimate will take, and it is not competent to show by evidence *aliunde* the will that the testator intended that the bastard should be the object of his bounty.

Whatever is not found in a special verdict is to be considered as not existing. The court must declare the law on the facts found alone. They must be self-sustaining and cannot be aided by any outside support.

Vansyckel v. Stewart, 27 P. F. Smith, 124, approved and followed.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This was an action of ejectment brought by Philip Byers, an illegitimate nephew of Peter Byers, against Tobias Appel. Subsequently the death of the plaintiff was suggested and his heirs substituted, and another Philip, a legitimate nephew of Peter Byers, added, as landlord, defendant. The land in dispute was the property of Peter Byers, deceased, who left the following will:

"I, Peter Byers, of Ross township, Allegheny county, do make my last will and testament in form as follows, viz:

"I will, devise and bequeath to my wife Margaret, all my estate, be same real or personal, and wheresoever situated, during her natural lifetime.

"It is my will, and I hereby devise that my nephew, Philip Byers, shall have and hold, after the death of my wife, all my real and personal estate on which I now reside; and lastly, I do hereby appoint my wife and J. McKnight my true and lawful executors to carry out this my last will and testament."

The widow died in May, 1880, and upon her death Philip Byers, the landlord, defendant, claiming to be the only nephew of Peter Byers, who filled the terms of the devise, entered into the possession of the land in dispute and demised it to Tobias Appel, the other defendant.

On the trial the counsel of defendant below objected that evidence *dehors* the will could not be admitted for the purpose of showing that the testator intended that the illegitimate nephew, Philip Byers, should inherit to the exclusion of the defendant, a legitimate nephew of the same name.

The court admitted the evidence and directed the jury to find a special verdict and reserved the legal question, and afterwards entered judgment on the question reserved for the plaintiff.

The special verdict was as follows: "We find that the testator, Peter Byers, deceased, died leaving two nephews; one Philip, th son of

Martin, legitimate, another Philip, the son of Louis, illegitimate.

"We find that the nephew intended by the testator to inherit, was Philip, the illegitimate nephew, the son of Louis, and this from evidence *aliunde* the will and not from the will itself.

"We therefore find for the plaintiffs, the heirs-at-law of Philip the illegitimate, the son of Louis, with six cents damages and costs of suit, subject to the opinion of the court upon the question of law, whether under the law and the evidence, there can be a recovery in favor of the illegitimate and against the legitimate nephew Philip, and if the court should be of opinion that there can be no such recovery at all, judgment to be entered for defendants *non obstante verdicto*."

For plaintiff in error, defendants below, *Messrs. Miller & McBride and J. M. Goehring. Contra, Walter G. Crawford, Esq.*

Opinion by MERCUR, J. Filed November 7, 1881.

Each party claims title to the land in question, under the same clause in the will of Peter Byers. He therein declares: "I hereby devise that my nephew, Philip Byers, shall have and hold, after the death of my wife, all my real and personal estate."

The jury returned a special verdict wherein they found "that the testator, Peter Byers, died leaving two nephews, one Philip, the son of Martin, legitimate; another Philip, the son of Louis, illegitimate." Also that the nephew intended by the testator to inherit, was Philip, the illegitimate nephew, the son of Louis, and this from evidence *aliunde* the will and not from the will itself." Thereupon the court entered judgment in favor of the heirs of Philip, the illegitimate. This presents the main cause of complaint.

Looking at the language of the will, we see it is clear and unambiguous as to the property devised and the object of the testator's bounty. That object is his nephew, Philip Byers.

A bastard at common law is *nullius filius*. As he is the son of no one it is difficult to see how he can be the nephew of any one. If Philip, the son of Louis, was not the lawful child of a brother or sister of the testator, he could not be a lawful nephew of the latter. The question then is, when Philip, the son of Martin, clearly and in all respects satisfies the terms of the will, may it be shown by other evidence that not he, but another person, was the one intended by the testator?

Philip, the son of Martin, was lawfully the nephew of the testator. Philip, the son of Louis,

was not such a nephew. This is not the case of a question between two legal nephews of the same name, or of names in some respects different. Nor is it a case where the name is not accurately expressed in the will.

A gift to children means legitimate children only, unless it appears from the context or from circumstances, that illegitimate children must have been intended: Hawkins on Wills, 80. The same rule applies to gifts to sons, issue and terms of relationship generally: *Id.*

In *Cartwright v. Fawdry*, 5 Ves., 530, the testator left his property to his children equally. He had four daughters, and it was not known that one of them was illegitimate. She lived with him just as his other daughters. He treated her in all respects like the others, and intended that she should take with them, yet it was held that she could not take. The Lord Chancellor declaring "it is impossible in a court of justice, to hold that an illegitimate child can take equally with lawful children upon a devise to children."

A man who had two illegitimate children by a certain woman, married her, and the day after his marriage made a will in which, after leaving her his real and personal estate for life, he said: "I leave her at liberty to direct the disposal of the property amongst our children by will at her death, in such manner as she shall see fit, and should she make no will, I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between my children by her." The testator had no children born to him after this marriage; but lived for sometime and always treated the two illegitimate children as his own children; yet it was held the testator died intestate as to the real and personal estate, beyond the interest given to the widow for her life: *Dorin v. Dorin*, Law Rep., 7 H. L., 568. It was there held that the word "children" in a will means *prima facie*, "legitimate children" as much so as if the word legitimate had been introduced before it.

In *Ellis v. Houston*, 10 Law Rep., Chanc. Div., 236, the testatrix gave a sum in stocks to trustees, upon trust to pay the dividends to her brother, Charles Ellis, and his wife Elizabeth for their lives and after the death of the survivor, the capital to be divided between all and every the children of her brother who should then be living, and the issue of such as shall then be dead. The brother had three children by his first wife; two children by his second wife Elizabeth before marriage, and one child after marriage. The fact that these two children were illegitimate was well known to the testatrix.

She promised her brother if he married Elizabeth she would provide for all his children by her, and thereupon the marriage took place. Thenceforth the testatrix continued on intimate and affectionate terms with the two illegitimate children, in all respects treating them as her nephews. Prior to the execution of her will she told them she would provide for them therein, and after its execution she told them she had so provided, and had made no distinction between them and their brothers and sisters. Still further, when she made her will she gave instructions to that effect and understood the language used was sufficient to identify the two illegitimate children and to include them among the children of Charles and Elizabeth Ellis; yet it was held that the illegitimate children must be excluded from the bequest; that the words of the will being distinct, no extrinsic evidence could be received to show what the intention of the testatrix was, the Vice Chancellor saying: "I believe the law is firmly settled that where you have a bequest of property to a class of persons, children, nephews or nieces, or any class you like, and you find in the class designated legitimate members, you can never admit illegitimate persons to share with them." This case, decided only three years ago, but ruled on many previous authorities, shows the settled law in England. The fact that in Pennsylvania, the subsequent marriage and cohabitation of the father and mother of an illegitimate child or children legitimates it or them under the statute, does not impair the force of the rule excluding illegitimate children. Here, after marriage, such children born before, take not as illegitimate children; but having the legal taint removed, they take as if "born during the wedlock of their parents."

No American authority was cited, which maintains the right of illegitimate persons to share with those who are legitimate when the latter are found, and strictly and fully answer the description in the written will.

Without regard to illegitimacy the better and more authoritative rule is, that the intention of the testator, as expressed in the will, must govern in its construction.

If, however, there is a mistake in the description so that no one corresponds to it in all respects; but some one does in many particulars and no other does, who can be intended, such person will take. Or if the will be plain and clear on its face, and only becomes doubtful when applied to the subject matter, extrinsic evidence of the intention of the testator may be received.

Unless there be some ambiguity or obscurity

on the face of the will, or difficulty in finding the person or object to which it applies, extrinsic evidence should not be received to divert the will from the intention therein expressed. In *Tucker et al., Executors, v. Seamen's Aid Society*, 7 Metcalf, 188, the testator gave a legacy to "The Seamen's Aid Society in the City of Boston" and "The Seamen's Friend Society" claimed the legacy. The latter offered to prove that the testator had no knowledge of the existence of the society named in the will; that he did know of the other society; was deeply interested in its objects; had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will, to insert the legacy as made to said society; but the scrivener not knowing the existence of the society, told the testator the name of the society was "The Seamen's Aid Society," and the testator thereupon consented to have that name inserted. This evidence was held inadmissible, and that the society named and described in the will was entitled to the legacy.

It is true, in *Powell v. Biddle*, 2 Dall., 70, tried in the Common Pleas of Philadelphia in 1790, it was held that extrinsic evidence was admissible to award the legacy contrary to the express designation of the will, although the person accurately described therein, existed. No question of illegitimacy arose in that case. The case is without authority to control us, and I do not find the principle there declared, recognized by a higher court as a correct exposition of the law. On the contrary, in *Westhoff v. Draconst*, 3 Watts, 240, the question of admitting such evidence is discussed by Mr. Justice ROGERS. After declaring that courts of law have always leaned against parol evidence to explain the instruction of the testator, and that it can be admitted only where the ambiguity arises from extrinsic circumstances, so that the evidence is admitted from necessity, he proceeds to say: "The modern doctrine is, that where a subject exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity. Evidence is only admitted *dehors* the will from necessity to explain that which would otherwise have no operation."

If the rule were held otherwise a person could feel no security in making a will. His intention clearly expressed in writing, and the object of his bounty found, in all respects answering the description, might be defeated, and the statute relating to wills, be made practically inoperative. If the language of this will applied to two legitimate nephews, so that either could

take; but for the existence and claim of the other, then parol evidence would be admissible to prove which was intended.

In the present case there is neither patent nor latent ambiguity. The legitimate nephew precisely and in every respect answers the designation and description of the will; the other fails in law to be a nephew.

It was alleged on the argument that the legitimate nephew was in truth named Philip A. Byers, although not generally so called, and therefore did not precisely answer the description in the will. A sufficient answer to this is, the special verdict finds no such fact. It declares there are two Philip Byers, one legitimate, the other illegitimate. Whatever is not found in a special verdict is to be considered as not existing. The verdict cannot be aided by extrinsic facts, even if they appear on the record: *Vansyckel v. Stewart*, 27 P. F. Smith, 124. The court must declare the law on the facts found alone. They must be self-sustaining, and cannot be aided by any outside support.

This verdict shows that Philip Byers, the legitimate nephew of the testator, fully satisfies all the terms of the will. To him they are perfectly and solely applicable. Being thus distinctly and accurately described, there is no ambiguity to be explained. There is no necessity to go beyond him to give full effect to the will. To do so would not be to solve doubts or explain any obscurity; but to create them where none existed before. Under the facts found the learned judge erred in entering judgment in favor of the heirs of the illegitimate person on the question of law reserved.

Judgment reversed, and now judgment in favor of the defendants below (plaintiffs in error) non obstante veredicto.

BIRMINGHAM AND ELIZABETH TURNPIKE ROAD COMPANY, Defendant Below, v. THE COMMONWEALTH OF PENNSYLVANIA.

Where the charter of a road company provided in case of failure to keep the road in repair a proceeding by inquisition, under which the right to take tolls might be suspended. *Held*, that this remedy was for aggrieved individuals, and that the remedy of the Commonwealth by *quo warranto* was intact.

In *quo warranto* for neglect to keep the road in good order, it was no answer that the revenue derived from the road was not sufficient to keep it in repair.

Where it has been found, in such proceeding, that a company has permitted its road to be well-nigh impassable a large part of the year, during which time no tolls were collected, but that when the road became dry in the summer, tolls were taken, a judgment, upon such finding, of dissolution of the company and of ouster was right.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was a proceeding by *quo warranto* to try the title of the defendants to exercise the rights and franchises of a corporation.

This company was incorporated by an Act of Assembly, passed the 31st of March, 1836, to make a turnpike road. The corporation was organized and the road was subsequently constructed in accordance therewith, and has been used ever since as a public highway.

The suggestion of the attorney-general set forth the above facts and alleged that the company during a great part of each year allowed the road to be so out of repair as to be well-nigh impassable and refused to repair it—though totally abandoning the road and refraining from the collection of tolls during such times, they insisted, in the summer when the road had become dry, upon the payment of tolls—and that not only has said corporation, by reason of its abandonment for a large portion of the year during each year for ten years of its right to take tolls, lost said right, but in addition thereto, it has, by willful misue and abuse of its franchises forfeited its right to be a corporation and to take tolls upon said road.

The company denied that they had willfully permitted the road to become unfit for travel; that they had applied all their available receipts to keep it in repair and charged that the Commonwealth ought not to maintain its writ because that, by the charter of the company, in case of neglect to repair, a proceeding by inquisition was provided, under which the right to take tolls would cease until the roadway was put in perfect order. They claimed that by Act of 21st March, 1806, this remedy was exclusive.

To this, the Commonwealth demurred, and after argument the demurrer was sustained; and this constituted the first assignment.

On the trial of the case defendants offered to prove that for the past ten years, during which it was alleged they had not kept the road in repair, all the tolls collected and which the company was legally authorized to collect, were faithfully applied to keeping the road in good order and repair, and further offered to prove that during the ten years complained of in the suggestion, the company employed from six to fifteen men through the season to keep the road in repair and to put it in as good condition as the revenues would permit, to be followed by evidence of the character of the soil, and that when in bad condition, it was caused by the wheather.

This evidence was rejected and these rulings were assigned as error.

The jury rendered a verdict for the Commonwealth and thereon judgment of dissolution of the company and of ouster was entered; and this was also assigned as error.

For plaintiff in error, defendant below, *Messrs. Thomas C. Lazear and S. Schoyer, Jr.*

Contra, Messrs. A. M. Brown and C. A. O'Brien.

PER CURIAM. Filed November 21, 1881.

The remedies provided for in the charter were for aggrieved individuals, and the remedy of the Commonwealth by *quo warranto* was intact. It is not a case therefore in which the Act of 21st March, 1806, has any application. It certainly was no answer that the revenue derived from the road was not sufficient to keep it in repair. There was therefore no error in the rulings of the learned court and the judgment of ouster was entirely right.

Judgment affirmed.

Court of Common Pleas,

Lackawanna County.

EVANS v. IVES.

Plaintiff entered his rule to arbitrate. Upon the day fixed for choosing arbitrators the defendant failed to appear although notice had been served upon him as the law required; whereupon the prothonotary fixed the number of arbitrators at three and named a single woman as one. After the service of the second rule, two of the arbitrators met but the female arbitrator failed to appear, whereupon the arbitrators appointed a married woman in her place. The case then proceeded to an award in favor of the plaintiff, whereupon the defendant moved to set aside the award because of the appointment of a married or single woman as arbitrator. *Held,*

- (1.) That there is nothing in the Act of 1836 which prevents a married or single woman from being an arbitrator; and,
- (2.) That the rule must therefore be discharged.

This was an equitable ejectment to enforce specific performance of a contract for the sale of a tract of land, on which there was a balance of purchase money due the plaintiff. There were no material facts in dispute, and the whole interest in the case centres in the fact that a married woman sat as an arbitrator and concurred with another arbitrator in the award for plaintiff while the third arbitrator dissented and refused to sign the award.

A rule was taken by defendant to show cause why the award should not be set aside, and a case was stated for the opinion of the court. The facts are sufficiently set forth in the opinion.

For plaintiff, *A. D. Dean, Esq.*

The Act of 16th June, 1836, nowhere says that *men* shall act as arbitrators. The word *person* is used throughout the statute when speaking of arbitrators. There is no disqualification by reason of *race* or *sex*.

In the absence of one party at the time of choosing arbitrators the prothonotary is authorized to act for the absentee and "nominate suitable and disinterested *persons* as arbitrators:" *Purdon's Digest*, p. 83, pl. 40.

The presumption of law is that an officer follows the law and the reasonable exercise of his discretion will not be interfered with by the court: *Steele v. Herrington*, 1 Grant, 442; *Withers v. Haines*, 2 Barr, 437.

The legal disqualifications of married women have been removed by statutes in almost every case except where they remain for her own protection.

A married woman may be a trustee, a position that requires the exercise of judgment and discretion: *Perry on Trusts*, 36; *Still v. Ruby*, 35 Pa. St., 373.

She may be an administratrix: *Gyger's Estate*, 15 P. F. Smith, 311.

Contra, W. J. Woodward, Esq.

Opinion by HANDLEY, P. J. Filed October 31, 1881.

Rule to set aside award of arbitrators on case stated. The novel and very interesting question raised by this rule was submitted for our opinion during the last sitting of the court.

From the facts agreed upon, it seems that the plaintiff entered his rule to arbitrate, and served the same upon the defendant who failed to appear at the time and place fixed for choosing the arbitrators, whereupon in pursuance of the 14th Section of the Act of 1836, three arbitrators were duly appointed.

One of the arbitrators thus appointed was a single gentlewoman by the name of *Mary Howell*. At the meeting of the arbitrators *Miss Howell* failed to appear, but thereafter proceedings were had as follows, viz:

Now, July 1, 1881, John Runk and E. C. Newcomb, two of the arbitrators named, met at the time and place mentioned in the rule; plaintiff appears by counsel, defendant in default; due proof of service of the rule on *Mary Howell*, the absent arbitrator, having been made, the arbitrators present duly appointed *Mrs. Alice M. Winton* arbitrator to act in the place and stead of *Miss Mary Howell*, the absent arbitrator and, the arbitrators having been duly sworn, due proof of the service of this rule on defendant by his acceptance hereon, being made, after hear-

ing plaintiff's proofs and allegations do award in favor of the plaintiff, etc.

It was therefore agreed that if the court be of the opinion that in the absence of the defendant a woman could legally be appointed as an arbitrator, and upon her non-appearance, at the meeting of the other two arbitrators, her place could be supplied by the appointment of a married woman as arbitrator, then the rule to be discharged, otherwise to be made absolute. Counsel for the plaintiff contends that nowhere in the Act of 1836 does it appear that men shall be appointed arbitrators, and hence a woman may be an arbitrator. He also contends that the prothonotary, in the absence of one of the parties, at the time fixed for choosing arbitrators, is only required to nominate a suitable and disinterested person.

In this connection he cites the cases of *Withers v. Haines*, 2 Barr, 437; and *Steele v. Herrington*, 1 Grant, 442, to show that the prothonotary, while acting under his oath of office, is presumed to have performed his duty according to law. He further contends, that the defendant does not allege that the female arbitrator was "unsuitable" or "interested," nor is there any allegation of "misbehavior," or "corruption," or of "undue influence" in procuring the award.

From all this it can be seen that counsel for the plaintiff rests his case upon the construction to be placed upon the Act of 1836. Counsel for the rule failed to present any brief, and hence the burden was placed upon our shoulders to ascertain whether a gentlewoman, married or single, may or may not be appointed an arbitrator?

Proceedings before arbitrators we find to be a part of the common law of England for many centuries. In *Fitzhebert's Abridgment*, page 43, edition of 1577, we find this subject discussed. The first act of Parliament we find on the question of submitting cases to arbitrators, is *William the 3d*, chapter 15, which went into force on the 11th day of May, 1698. In this statute it is provided that controversies may be submitted to "any person or persons" as arbitrator: 3 *Evans' Statutes*, 360. We have no hesitation in saying that the framers of the Act of 1836, used the word "person" in that statute the same as it was used in the statute of *William*.

If we are correct here then our road is clear in this matter. The reading on this statute is, that neither natural or legal disabilities hinder any one from being an arbitrator: 1 *Reading on the St.*, 103.

Lord BACON says, that arbitrators are persons indifferently chosen, to determine the matter in controversy, and then adds "that infants, per-

sons excommunicated, outlawed, etc., may be arbitrators, for every person must use his own discretion in the choice of his judges:" 1 Bacon's Abr., 317; 3 Viner's Abr., 41.

In the case of *Mathew v. Ollerton*, 4 Mod., 226, a man took a horse from a Bishop. The Archbishop brought this action, and the defendant agreed to submit the same to the Bishop as arbitrator. The Bishop decided in his own favor, whereupon the defendant moved to set aside the award because the Bishop was interested in the case. But Lord HALE refused after argument, for the reason that the defendant had selected his judge to decide his case.

The defendant in that case evidently overlooked the fact that the Bishops of modern times make wills, while the apostles did not. Had the defendant given this subject the least thought he certainly would not have made the plaintiff in his case, sole arbitrator to decide his case.

The Roman law expressly provided that if a man be constituted arbitrator in a dispute to which he is a party, he cannot pronounce an award: Kyd's Award, 71.

The Roman law in this respect corresponds with the fifth paragraph of the 40th Section of the Act of 1836; but the first paragraph of the same section is in strict accordance with the decisions at common law.

In the first paragraph of the 40th Section it is expressly provided that the parties may select any one person whom they shall concur in choosing: 1st Purd. Dig., '82 § 40.

In West's Symboliography, 163, it is said that a married woman cannot be an arbitrator. This, however, is the rule of the civil law. Justinian says that it is contrary to the proper character of the sex to allow women to intermeddle with the office of a judge: Kyd's Award, 71; Wood's Civil Law, 327. In Kyd on Awards, 70-1, it is said that an unmarried woman may be an arbitrator. To sustain this the author cites the Duchess of Suffolk case, 8 E., 41; Br., 37.

In 2 Petersdorff Abr., 129, it is said that it is no objection to an award that the arbitrator is a married woman. Gentlewomen have also held and exercised judicial authority. Annie Countess of Pembroke held the office of sheriff of Westmoreland and exercised the duties thereof in person. At the assises of Appleby, she sat with the judges on the bench: Hargr Co., Lit., 326; 8 Bac. Abr., 661. Her right to sit upon the bench as a judge, will be fully understood when it is borne in mind the sheriffs, at that time, held court and exercised judicial power. Sheriffs had power to inquire of all capital offenses and issue process and enforce the same. But this power was afterwards restrained. By Magna

Charta, chapter 17, it was enacted "That no sheriff shall hold pleas of the crown:" 8 Bacon's Abr., 688.

Eleanor was appointed Lord Keeper of England. It would seem from the history of this noble woman, that she actually performed the duties of Lord Chancellor in person. It is said of her that in the summer of 1235, King Kenry appointed her Lady Keeper of the great seal. She accordingly held the office nearly a whole year, performing all the duties, as well judicial as ministerial; she sat as a judge in the *Aula Regia*. These sittings were, however, interrupted by the *accouchment* of the judge when she was delivered of a daughter. After retiring from the bench, and the appointment of her successor, she was delivered of a boy, who afterwards became Edward I of England: 1 Campbell, L. L. Ch., 134-7. Without referring in any manner to Eve, the first arbitrator appointed in this world to decide the controversy about eating the forbidden fruit, or to the manner Deborah judged Israel, we are clearly of the opinion that under the Act of 1836, a woman, married or single, may be appointed arbitrator and may act as such, and make a valid award.

Rule discharged.

In the Supreme Court of Penn'a,

FOR THE WESTERN DISTRICT.

October and November Term, 1881.

ORDER OF COURT

Transferring Certain Counties from the Middle and Western Districts to the Eastern District of the Supreme Court—Changing the Terms in said Districts and Establishing Return Days:

And now, November 25, 1881, by virtue and in pursuance of an Act of the General Assembly of the Commonwealth of Pennsylvania, approved the fifth day of May, 1876, entitled "An Act authorizing the Supreme Court to change and transfer any of the counties of the Commonwealth from any of the districts of said court:" P. L., 115, it is hereby ordered by the said court, now sitting at Pittsburgh, in and for the Western District thereof, as follows, that is to say:

The following counties shall be and are hereby transferred from the Middle District to the Eastern District of the said court, viz:

Bedford, Blair, Cumberland, Centre, Columbia, Clinton, Clearfield, Cameron, Elk, Fulton, Huntingdon, Juniata, Lancaster, Lycoming, Lebanon, Mifflin, Montour, McKean, North-

umberland, Perry, Potter, Synder, Sullivan Tioga, Union, Warren, York.

The following counties shall be and are hereby transferred from the Western District to the Eastern District of said court, viz:

Armstrong, Butler, Cambria, Clarion, Crawford, Erie, Fayette, Forest, Indiana, Lawrence, Mercer, Somerset.

By reason of the said transfer, the Western, Middle and Eastern Districts of the Supreme Court shall hereafter stand and be composed of the following named counties, viz:

The Western District of Allegheny, Beaver, Greene, Jefferson, Venango, Westmoreland, Washington.

The Middle District of Adams, Dauphin and Franklin.

The Eastern District of Armstrong, Bucks, Butler, Bedford, Blair, Bradford, Berks, Cambria, Clarion, Crawford, Carbon, Chester, Cumberland, Centre, Columbia, Clinton, Clearfield, Cameron, Delaware, Erie, Elk, Fayette, Forest, Fulton, Huntingdon, Indiana, Juniata, Lawrence, Lehigh, Lebanon, Luzerne, Lackawanna, Lycoming, Lancaster, Mercer, Monroe, Montgomery, Mifflin, Montour, McKean, Northampton, Northumberland, Philadelphia, Perry, Potter, Pike, Schuylkill, Somerset, Susquehanna, Snyder, Sullivan, Tioga, Union, Wayne, Wyoming, Warren, York.

By virtue of the same Act of Assembly the terms in the respective districts are fixed as follows:

The term in the Western District shall commence on the first Monday of October and shall continue four weeks.

The term in the Middle District shall commence on the twenty-first Monday following the first Monday of January and shall continue one week.

The term in the Eastern District shall commence on the third Monday of November and shall continue until the commencement of the term for the Middle District.

By virtue of the same Act of Assembly return days are hereby established for all of the aforesaid counties, as follows:

For the Western District, the return day for the counties of Allegheny, Beaver, Greene, Jefferson, Venango, Westmoreland and Washington shall be the first Monday of October. The last three weeks of the term are hereby assigned to the hearing of all cases in and for the said county of Allegheny.

For the Middle District, the return day for the counties of Adams, Dauphin and Franklin shall be the twenty-first Monday following the first Monday of January.

For the Eastern District, the return days for the city and county of Philadelphia shall remain as heretofore.

For the other counties of the Eastern District the return days shall be as follows:

For the first Monday of the term, the counties of Cambria, Clarion, Butler and Fayette.

For the second Monday of the term, the counties of Crawford and Mercer.

For the third Monday of the term, the counties of Armstrong, Erie, Forest, Indiana, Lawrence and Somerset.

For the fifth Monday following the first Monday of January, the counties of Chester and Delaware.

For the sixth Monday following the first Monday of January, the counties of Lycoming, Centre and Elk.

For the seventh Monday following the first Monday of January, the counties of Lackawanna, Pike and Wayne.

For the eighth Monday following the first Monday of January, the counties of Berks and Columbia.

For the ninth Monday following the first Monday of January, the counties of Carbon, Lehigh, Monroe and Northampton.

For the tenth Monday following the first Monday of January, the counties of Bradford, Susquehanna and Wyoming.

For the fourteenth Monday following the first Monday of January, the county of Luzerne.

For the fifteenth Monday following the first Monday of January, the counties of Schuylkill and Montgomery.

For the sixteenth Monday following the first Monday of January, the counties of Bucks, Clinton, Montour and Northumberland.

For the seventeenth Monday following the first Monday of January, the counties of Clearfield, Lebanon, Snyder and Union.

For the eighteenth Monday following the first Monday of January, the counties of Bedford, Cameron, Cumberland, Fulton, McKean, Perry, Potter, Sullivan and Tioga.

For the nineteenth Monday following the first Monday of January, the counties of Lancaster and York.

For the twentieth Monday following the first Monday of January, the counties of Blair, Huntingdon, Juniata, Mifflin and Warren.

The fourth week of the term in the Eastern District is assigned to remanets from the Western District, and such other cases from the said Western District, as the parties may desire to have heard in the Eastern District, preference being given to remanets.

Eight weeks of the term are hereby assigned

for the hearing of all cases for the city and county of Philadelphia. The first period shall commence on the first Monday of January and shall continue, for five weeks; the second period shall commence on the eleventh Monday following the first Monday of January, and shall continue for three weeks.

To which return days all writs of error, process and proceedings in and for the said several counties in the respective districts, shall be accordingly and respectively returnable; and the causes from the said several counties shall be heard in the same week to which their writs of error and other process are respectively returnable, excepting as is herein otherwise provided for the counties of Allegheny and Philadelphia.

It shall be the duty of the Prothonotary of the Western and Middle Districts, respectively, to certify to the Prothonotary of the Eastern District, the record in all cases now pending and undetermined upon writ of error, *certiorari* or appeal, originating in each of the counties hereby transferred from the Western and Middle to the Eastern District.

This order shall be certified by the Prothonotary of the Western District to the respective Prothonotaries of the Middle and Eastern Districts; and the said order shall be published for four weeks in the PITTSBURGH LEGAL JOURNAL at the expense of the county of Allegheny; once a week for four weeks in the *Harrisburg Telegraph* and *Harrisburg Patriot*, at the expense of the county of Dauphin, and four times in the *Legal Intelligencer* and *Weekly Notes of Cases*, at the expense of the city and county of Philadelphia.

PER CURIAM.

(GEO. SHARSWOOD,
Chief Justice.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments and opinions were handed down on the 26th inst., all the Justices except MERCUR and GREEN being present:
PER CURIAM.

The Township of Allegheny v. Boyle. Error to the Court of Common Pleas of Butler county. Judgment affirmed.

Templeton v. Hart. Error to the Court of Common Pleas of Butler county. Judgment affirmed.

Kurns City and Butler Railroad Co. v. McCundless. Error to the Court of Common Pleas of Butler county. Judgment affirmed.

Adams v. Morland. Error to the Court of Common Pleas of Butler county. Judgment affirmed.

Township of Allegheny v. Knee. Error to the Court of Common Pleas of Butler county. Judgment affirmed.

Commonwealth v. School Directors of Forward Township.

Error to the Court of Common Pleas of Butler county. Judgment affirmed.

Overseers of Jefferson v. Overseers of Winfield. Error to the Court of Quarter Sessions of Butler county. Judgment affirmed.

Robinson's Appeal from the decree of the Orphans' Court of Butler county. Decree affirmed and appeal dismissed at the costs of the appellant.

Logue's Appeal from the decree of the Orphans' Court of Butler county. Decree affirmed and appeal dismissed at the costs of the appellant.

Bard's Appeal from the decree of the Orphans' Court of Butler county. Decree affirmed and appeal dismissed at the costs of the appellant.

Mellon's Appeal from the decree of the Orphans' Court of Butler county. Decree affirmed and appeal dismissed at the costs of the appellant.

Campbell's Appeal from the decree of the Court of Common Pleas of Butler county. Decree affirmed and appeal dismissed at the costs of the appellant.

Eastman's Appeal from the decree of the Court of Common Pleas of Butler county. Decree affirmed and appeal dismissed at the costs of the appellant.

Biddler v. The First National Bank of Waynesburg. Error to the Court of Common Pleas of Greene county. Judgment affirmed.

Garrison v. Paul. Error to the Court of Common Pleas of Greene county. Judgment affirmed.

Gray v. Mapel. Error to the Court of Common Pleas of Greene county. Judgment affirmed.

First National Bank of Waynesburg v. Lusc. Error to the Court of Common Pleas of Greene county. Judgment affirmed.

Snyers v. Lightner. Error to the Court of Common Pleas of Greene county. Judgment affirmed.

Crawford's Appeal from the decree of the Orphans' Court of Greene county. Decree affirmed and appeal dismissed at the costs of the appellant.

Snider v. The Commonwealth. Error to the Court of Common Pleas of Fayette county. Judgment affirmed.

Ewing v. Ewing. Error to the Court of Common Pleas of Fayette county. Judgment affirmed.

Beeson v. Brownfield. Error to the Court of Common Pleas of Fayette county. Judgment affirmed.

Speer's Appeal from the decree of the Court of Common Pleas of Washington county. The decree of the Court below refusing the preliminary injunction is affirmed and the appeal dismissed at the costs of the appellant.

The Wheeling, Pittsburgh & Baltimore Railroad Co.'s Appeal from the decree of the Court of Common Pleas of Washington county. Decree affirmed and appeal dismissed at the costs of the appellant.

BY GORDON, J.

Wheeling, Pittsburgh & Baltimore Railroad Co. v. John Gourley ex rel. Error to the Court of Common Pleas of Washington county. Judgment reversed.

Dushane et al. v. National Bank of Fayette County. Error to the Court of Common Pleas of Fayette county. Judgment affirmed.

BY TRUNKY, J.

Morgan R. Wise's Appeal from the decree of the Court of Common Pleas of Greene county. The order and decree is reversed and the rule to show cause why the judgment as against Morgan R. Wise should not be opened is made absolute, the record to be remitted for further proceedings. Appellees to pay the costs of this appeal.

Humphrey ex rel. v. The Overseers of Worth Poor District. Error to the Court of Common Pleas of Butler county. Judgment affirmed.

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No. 17.

PITTSBURGH, PA., DECEMBER 7, 1881.

Supreme Court, Penn'a.

WILLIAM C. MCCARTHY et al., Defendants
Below, v. HARRY C. DEARMIT.

The gist of false imprisonment is unlawful detention, and the general rule is that malice will be inferred from the want of probable cause, so far at least as to sustain the action.

What facts and circumstances amount to probable cause is a question of law. If the admitted facts amount to probable cause, the court should direct a verdict for the defendant, even if his malice were clearly proved.

In an action for false imprisonment the burden is on the defendant to prove that the imprisonment was by authority of law, but, in a grave felony, the evidence on the part of a defendant who is charged with the duty of preserving the public peace, need not be very strong to shift the burden upon the plaintiff to establish want of reasonable cause and malice.

If a justice of the peace, without reasonable cause, maliciously orders the arrest of a person for breach of the peace, or felony, he may be compelled to answer the injured party in compensatory damages, and, also, exemplary, proportionate to the wantonness and oppressiveness of his conduct.

In trespass all the defendants are alike guilty, the damages are not divisible and the verdict should be for one amount against all the defendants for such sum as the most culpable ought to pay.

Where exemplary damages are claimed against several defendants, the jury should be instructed to assess them according to the acts of the most innocent of the defendants, and if any of them are not liable therefor none should be included in the verdict.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This was an action of trespass *vi et armis*, brought by DeArmit against William C. McCarthy, Mayor of the City of Pittsburgh, and Coulson, Jacobs, Friel, McAleese and Matts, police officers to recover damages for a false arrest and imprisonment. The arrest was made on the Saturday following the Sunday on which the riot and killing of Philadelphia soldiers occurred in 1877, and the charge against DeArmit was that he had killed the soldiers. No information was made, McCarthy simply instructing the chief of police to have him arrested. The other defendants made the arrest. On the Tuesday following the arrest DeArmit was discharged on a writ of *habeas corpus*, the Mayor communicating to the court that he had no testimony to offer against him and advising his discharge. On the trial the defendants offered evidence, in justification of the arrest, to the

effect that several persons had communicated to the Mayor that DeArmit had done the killing. There was a verdict and judgment thereon for \$2,500 against all the defendants. This writ was then taken, counsel assigning for error:

1. In answering the first point of the plaintiff below: "That to prevent a recovery in this action the defendants must show probable cause for the arrest and detention of the plaintiff."

"Answer.—This point is affirmed. There was no warrant or process upon which the plaintiff was arrested, and it is plain the injury complained of was of that forcible and direct kind, that unless it was maliciously done under color of legal process, is remediable in an action of trespass; the ground of proceeding in the two cases are different; in the one the plaintiffs must show the want of probable cause, in the other, this form and cause of action, arrest without information or warrant, viz: Trespass. It is enough for him (the plaintiff) to prove the act of violence, and the defendant must justify it, if a private individual—not this case—by proving an offense actually committed, and the plaintiff guilty of it; if a peace officer or officers—this case—that he had reasonable ground, probable cause, to suspect the plaintiff to be concerned in the offense."

2. In affirming the tenth point of the plaintiff below: "That the probable cause to justify the arrest and detention of the plaintiff must be that which would justify any prudent, cautious man in the premises."

3. In affirming the eleventh point of the plaintiff below: "Malice in this action need not be specially proved on the part of the plaintiff."

"Answer.—This point is affirmed. We have already so stated with the reasons for the same in detail in our answer to plaintiff's first point."

4. In affirming the fourteenth point of the plaintiff below: "The testimony for the defense, if believed, does not disclose any ground of probable cause, and the verdict should be for the plaintiff."

5. In charging the jury as follows, to wit: "I now instruct you that your verdict must be against the defendant generally, making no distinction, for whatever amount you may think the one most responsible and most guilty ought to pay."

"Juryman.—We are not at liberty to make a distinction between exemplary damages and any other damages?"

"By the Court.—If I have not stated, I ought to state, that you have the right to find exemplary damages; if you think the act has been wanton, cruel and unjust, you have the right to find exemplary or punitive damages so-called."

"*Juryman*.—In such a case as that, we divide the damages?"

"*By the Court*.—No, sir; you simply assess whatever damages you find against everybody; you understand, as a whole, you cannot divide any damages."

"*Juryman*.—The act contemplates exemplary damages as well as other damages?"

"*By the Court*.—It does."

6. The charge of the court was contradictory, and misled the jury in this, that while the court affirmed the sixth point of the plaintiff below, which point is as follows: "The same general principles which excepts judges from answering in a private action for *tort*, applies to justices of the peace," he at the same time affirmed the fourteenth point of the plaintiff below, which point is as follows: "The testimony for the defense, if believed, does not disclose any ground of probable cause, and the verdict should be for the plaintiff."

7. In refusing the third point of the defendants below: "That the probable cause operating on the mind and judgment of the Mayor, William C. McCarthy, does not depend on the actual state of the case, but upon his honest and reasonable belief at the time of the arrest."

8. In refusing the fifth point of the defendants below: "That in this form of action, trespass *vi et armis* for false imprisonment, the law requires substantially the same allegations and proof of malice, and want of probable cause as in an action of malicious prosecution."

9. The court erred in taking from the jury the question of probable cause, and in instructing them that under all the evidence in the case, the plaintiff was entitled to recover, and the only question for the jury to determine was one of damages.

10. In overruling the objection and permitting the following questions to be asked. William C. McCarthy, witness on the stand. On his cross-examination, counsel for the plaintiff below proposed to asked the following question:

"Q.—Did you not on Friday, before the riot, in a barber-shop, in the presence of a number of persons, including J. H. Reed and Charles M. Powers, denounce the bringing on of the Philadelphia soldiers, and say they were here for the purpose of shooting down common people like you and the barber you were talking to?"

"This question for the purpose of showing to what extent the witness was actuated by the exigences of the public situation in making this arrest."

"A.—I think it altogether likely that I said so."

11. In overruling the objections to, and per-

mitting the following question to be asked on cross-examination, William C. McCarthy being the witness on the stand:

"Q.—What else was charged against you by the community at large by which you were hounded?"

"A.—The question is not fairly put."

"*By the Court*.—Answer it as well as you can."

"A.—I have very good reason to believe that a large portion of the community was of the opinion that I have not performed my duty, in which they were mistaken, however. I may say further, that had I been allowed to have control of the matter, if it hadn't been taken out of my hands, there would not have been a dollar's worth of property nor a single life lost, and that if the men who controlled this matter had been actuated by the spirit of Coleridge, who says: 'He prayeth best who loveth best, both men and bird and beast,' we would not have been here lamenting the lives of twenty-three men lost."

12. In overruling the objections to and allowing the following question to be asked on the cross-examination of William C. McCarthy, the witness on the stand:

"Q.—Will you state whether or no you did arrest, or have Mr. Phillips arrested, on the 27th day of July, the day before these DeArmits were arrested, for shooting Philadelphia soldiers, upon the sworn information of Sol. Coulson, one of the defendants in this case?"

"This for the purpose of bearing upon the question of the sufficiency or probable cause attempted to be set up by the defendants for the arrest of the DeArmits without a warrant."

"A.—Judging from this paper, which I have entire confidence in, that is a fact; this is my signature to the paper; the information was taken before me."

13. In affirming the fifteenth point of the plaintiff below: "If the jury believe there were circumstances of outrage or oppression, either in the arrest of the plaintiff or his detention afterwards, by any of the defendants, the jury may give exemplary damages."

For plaintiffs in error, *Messrs. D. T. Watson and M. Swartzwelder.*

Contra, Messrs. S. Schoyer, Jr., and West McMurray.

Opinion by TRUNKY, J. Filed November 21, 1881.

Prosecutions are presumed to have been properly instituted; and hence, to sustain an action for malicious prosecution, malice and want of probable cause must both concur and be proved

by the plaintiff: *Walter v. Sample*, 1 Cas., 275; *Dietz v. Langfitt*, 13 P. F. S., 234.

Probable cause does not depend on the state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting. Among the numerous attempts to define it are: "A reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in believing that the party is guilty of the offense;" and, "A deceptive appearance of guilt arising from facts and circumstances misapprehended, or misunderstood, so far as to produce belief." The substance of all the definitions is a reasonable ground for belief of guilt. Representations of others may be an adequate foundation for it especially if made by those who have had opportunities for knowledge, or who have made investigation: *Smith v. Ege*, 2 P. F. S., 419. He, who has probable cause, or in other words, reasonable grounds for belief of guilt, stands acquitted of liability: *Travis v. Smith*, 1 Barr, 234. This question must be judged by the circumstances existing at the time of the arrest for the offense charged; and it is immaterial that the prosecutor subsequently learned his mistake: *Swain v. Stafford*, 4 Ind., 392. The belief must be that of a reasonable and prudent man, else the most baseless prosecutions would be safe. But some allowance will be made where the prosecutor is so personally injured by the offense that he could not likely draw his conclusion with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. And all that can be required of him is that he shall act as a reasonable and prudent man would be likely to act under like circumstances: *Cole v. Curtis*, 16 Minn., 182. In *Fisher v. Forester*, 9 Cas., 501, WOODWARD, J., said of the defendant who had commenced a prosecution which failed: Doubtless he was greatly excited and not wholly without cause; and it is not strange that he was mistaken, in some particulars, in recounting the events of the moment. And he was not condemned for his mistakes.

What facts and circumstances amount to probable cause is a question of law. Whether they exist in any particular case is a question of fact. Where the facts are in controversy the subject must be submitted to the jury, in which event it is the duty of the court to instruct them what facts will constitute probable cause, and submit to them only the question of such facts. This principle is well settled. If all the evidence is insufficient to establish probable cause, the court shall so instruct the jury, for they are not at liberty to find a fact without evidence; and if the admitted facts amount to

probable cause, the court should direct a verdict for the defendant, even if his malice were clearly proved.

Malice in law exists where an act is done wrongfully and designedly by one person to the injury of another. Prosecutions may be instituted and pursued with pure motives, but so regardless of the forms of law and judicial proceedings as to render the transactions illegal and malicious: *Page v. Cushing*, 38 Me., 523. Yet something more than mere legal or theoretical malice is requisite to sustain an action for malicious prosecution, for it must be proved as a fact. It may be inferred from the want of probable cause, and generally is, but its existence is a fact for the jury. Where it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence in the cause, that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, namely, the malice of the defendant in pressing the charge: *Van-bill v. Mathias*, 5 Duer, 304. Where the prosecutor submits the facts to an attorney at law who advises they are sufficient, and he acts thereon in good faith, such advice is often called probable cause and is a defense to an action for malicious prosecution; but in strictness, the taking of the advice of counsel and acting thereon rebuts the inference of malice arising from the want of probable cause. The law favors honest efforts to bring the guilty to justice, and when a citizen proceeds by complaint before a magistrate, though the prosecution be unwarranted in fact, if his motives were pure he will be protected.

The foregoing principles have been brought into view because most of them apply in the pending case. This action is against the Mayor and his officers for false imprisonment and in some respects it is by no means analogous to an action for malicious prosecution. In that, the presumption is that the defendant is not guilty. In this, the act in itself is wrongful, and the burden is upon the defendants to prove that the imprisonment was by authority of law. The question of probable cause in trespass for false imprisonment is one of law, and upon principle there is no ground for diversity on this point. It was so treated in *Burns v. Erben*, 40 N. Y. (Hand), 463, and in *Wakeley v. Hart*, 6 Binn., 316; and is sustained by the weight of authority in this country and in England.

The fact of felony, and reason for suspecting a particular person, justify his arrest by a pri-

vate person. But a peace officer who arrests one upon reasonable suspicion of felony, will be excused, even though it appear afterwards that in fact no felony had been committed. It may be expected that a felon will flee from justice if an opportunity is afforded him, and that if he knows he is suspected he will do what may be in his power to obliterate the evidences of his crime. In these circumstances are found forcible reasons for prompt action in his arrest. The public safety and due apprehension of criminals charged with heinous crimes, imperiously require that such arrests should be made without warrant by officers of the law. "Many an innocent man has been and may be taken up on suspicion; but the mischief and inconvenience to the public in this point of view, is comparatively nothing; it is of great consequence to the police of the country:" *Burns v. Erben, supra*; *Rohan v. Swain*, 5 Cush., 281; *Wakeley v. Hart, supra*; Cooley on Torts, 174.

The gist of false imprisonment is unlawful detention, and the general rule is that malice will be inferred from the want of probable cause, so far at least as to sustain the action. Constables and other police officers who arrest persons suspected of having committed felony, in actions for damages, should be allowed to defend upon like principles as a private person who causes an arrest by a complaint on oath; for it is the duty of these officers to make such arrests. If an officer wantonly and maliciously arrests an innocent man he ought to be liable in quite as heavy punitive damages as a private person would be for a causeless and malicious prosecution; but if without malice and in the honest endeavor to arrest and bring a felon to justice, he takes an innocent person who was unjustly suspected, he should not suffer at all. And if the sheriff, or mayor of a great city, or a justice of the peace, be sued for false imprisonment, made in an effort to suppress riot, or to arrest a murderer, the evidence on the part of the defendant showing his good faith, and the existence of probable cause, need not be very strong to shift the burden upon the plaintiff to establish want of reasonable cause and malice. It is of the utmost importance that these officers act promptly and fearlessly, as well as honestly, in such circumstances.

In the order for the plaintiff's arrest the Mayor acted in his ministerial capacity, not his judicial. No complaint had been made before him; he did not hear and determine. Many of the proper acts of a justice of the peace are ministerial. In the performance of these, if he wrongfully injure an individual, he would be liable the same as if he were not clothed with certain

judicial functions. If an officer fail to perform a ministerial duty of a purely public character, as the execution of a capital sentence, no private person would have a right of action against him. Where the ministerial duty involves individual rights the case is different. If a justice of the peace, without reasonable cause, maliciously orders the arrest of a person for breach of the peace, or felony, he may be compelled to answer the injured party in compensatory damages, and, also, exemplary, proportionate to the wantonness and oppressiveness of his conduct. Otherwise the danger from the acts of reckless officers would be only less than the danger of holding honest and prudent officers liable in damages whenever they mistakenly arrested an innocent man.

In trespass all the defendants are alike guilty, each is liable for the damages sustained without regard to the different degrees or shades of guilt, the damages are not divisible, and the verdict should be for one amount against all the defendants for such sum as the most culpable ought to pay. This rule has few exceptions. However, where exemplary damages are claimed against a defendant, his intent must be considered. Two persons may be liable, one for punitive damages, and the other only for compensatory. As where the plaintiff was arrested by a police officer and another, one acting in good faith and the other maliciously, the true criterion of damages is the whole injury which the plaintiff sustained from the joint trespass. In such case, if the plaintiff means to get exemplary damages, he should proceed against the party which ought to be punished in that way: *Clark v. Newson & Edwards*, 1 Exc., 130. Under the evidence in this case the jury should have been instructed, as respects exemplary damages beyond compensation for the injury done to the plaintiff, to assess them according to the acts of the most innocent of the defendants, and if any defendant was not liable for exemplary damages, none should be included in the verdict; for the question was as to the motives of the defendants.

Having expressed our opinion upon the principal questions of law raised by the assignments of error, it remains to consider whether the jury were rightly instructed to render a verdict for the plaintiff. If the defendants failed to prove probable cause, or to disprove malice, the instruction was just.

On Saturday, July 21, 1877, a riot occurred in Pittsburgh, during which more than twenty persons were killed and a vast amount of property destroyed. For ten days the community was considered in a dangerous condition, troops

were present under the command of the Governor of the State, an extra force of police was employed, and a committee of public safety were meeting every day. At Forty-ninth street, near the cemetery, on Sunday morning, two soldiers were killed. The night before a brother of the plaintiff had been killed, as alleged, by the soldiers. Within a few days Mr. Bostwick told White, a detective officer, that James Graham, on Sunday, had pointed to a man and said: "Bostwick, there goes DeArmit, the man that shot those two soldiers at the cemetery." White at once informed the Mayor who directed him to investigate in the neighborhood where the men were shot. He did so, and was informed that several citizens had seen the murderer, who left his gun at the house of Reardon, immediately after the shooting. Graham told him to go to Dale who could give him the information wanted. Dale did not like to say anything, was afraid to express himself, and in answer to the question if the name was DeArmit, said: "You are damn near it, I have nothing more to say," and walked off. The officer found it difficult to get people to talk about it, they evaded, and appeared to be in fear; but all who said anything said the man was a DeArmit, from the reports. The officer communicated what he learned to the Mayor. These facts the jury could well have found and doubtless would, had the opportunity been given. The fact of the felony is now admitted, and it was then notorious. By law, the Mayor is the chief conservator of the peace in the City of Pittsburgh. Upon the verity of the testimony adduced by the defendants, the Mayor had probable cause to suspect that the plaintiff had committed the crime. "The condition of the community during the time covered by the testimony" was material for him to consider with the fact that citizens appeared in fear, and evaded the inquiries of the detective officers. Probable, they feared the mob, or the murderer. This fact, also, would bear upon the apparent necessity of arresting both the DeArmits at the same time. The facts, as they appeared at and before the giving of the order for the arrest, must control in determining if there was reasonable cause. Very often appearances are not the same after the event, as before.

We think the facts in this case more clearly show probable cause for the arrest, than did the facts in *Smith v. Ege*, 2 P. F. S., 419, for the prosecution. There the prosecutor employed detectives who were informed by the neighbors that suspicion rested upon the Smith family; a girl told them one of the Smith boys had said to her he committed the murder, and a knife

said to have belonged to the murdered man was found in the cabin of the boys. Upon this information, complaint was made by Ege, the father and sons were arrested and committed to jail, and on a further hearing they were discharged. It was held, in an action by the father for malicious prosecution, that there was reasonable ground for belief of the guilt of the plaintiff and his sons. Where a high crime has been committed very stringent proof is not required to establish that the prosecutor had ground for reasonable belief that a suspected party was guilty. As already seen, peace officers may arrest upon suspicion of felony. A high officer, as the sheriff, may arrest a party merely suspected of a capital offense. Suspicion is not belief. Probable cause for suspicion by a prudent and reasonable man, that a party committed a high crime, may not be sufficient to induce him to believe such party guilty. If the Mayor had good reason to suspect, it was his duty to act, to the end that the felon should not escape.

Were the evidence insufficient to establish probable cause, and such as to warrant a finding that the defendant, as Mayor of the City, without malice, and with the single purpose of bringing the murderer to a trial by due process of law, ordered the plaintiff's arrest, the fact would be for the jury. Because the plaintiff was innocent of the crime, it does not follow that the Mayor was malicious.

An innocent man is unfortunate when he is suspected of having committed a high crime, and is deeply injured when imprisoned upon suspicion; but he has no redress, if his injury came through the proper action of a public officer while in the faithful performance of his duty.

The questions set out in the tenth, eleventh and twelfth assignments were so foreign to the issue that they ought to have been overruled. Though asked in cross-examination, they were not admissible as tending to discredit the witness.

Judgment reversed and venire facias de novo awarded.


In Re Petition of **WILLIAM HERRING** for a Writ of Habeas Corpus.

A prisoner sentenced by the Court of Quarter Sessions to imprisonment in the Allegheny County Workhouse and to pay a fine and costs cannot be arrested on process from that court and committed to jail for non-payment of the fine and costs after his discharge from the workhouse, even if said discharge be not made in compliance with the Act of 23d of March, 1872, § 2, P. L., 560.

The petition set forth that Herring was indicted, tried and convicted at No. 180 of June

Sessions, A. D. 1881, of the Court of Quarter Sessions of Allegheny county, for keeping a disorderly house in said county; that he was sentenced on the 9th day of July, 1881, to imprisonment in the Allegheny County Workhouse for and during the term of three months, to pay a fine of \$500 and the costs of prosecution; that he served the full term of imprisonment imposed and was discharged from the workhouse by the superintendent thereof in accordance with the rules and regulations, on October 10, 1881; that on the same day, after being discharged, he was arrested and taken in custody by one J. J. Walker, acting under and by virtue of the following process:

ALLEGHENY COUNTY, SS.

 *The Commonwealth of Pennsylvania, to the Sheriff or any Constable of the County of Allegheny, Greeting:*

We command you, J. J. Walker, that you take Wm. Herring, late of your county, yeoman, if he be found within your bailiwick, and him safely keep, so that you have — No. 180. June T., 1881, before our Judges at Pittsburgh, at our County Court of General Quarter Sessions of the Peace and Jail Delivery, there to be held for the county aforesaid, forthwith, to answer an indictment for Five Hundred Dollars, fine and costs in our said court against him keeping disorderly house, found and depending, and there to be tried. And have you then and there this writ.

Witness, the Honorable J. M. KIRKPATRICK, President of our said Court at Pittsburgh, the 4th day of October, in the year of our Lord one thousand eight hundred and eighty-one. A. H. ROWAND, Jr., Clerk.

October 10, 1881.

That under the foregoing process he was committed to the common jail of Allegheny county and still detained there; that he believed his imprisonment to be without authority of law, and prayed that a writ of *habeas corpus* might issue, etc.

The court granted the writ as prayed for, and on the 26th ult. the case was heard before SHARSWOOD, C. J., and GORDON, PAXSON, TRUNKEY and STERRETT, JJ.

For the Commonwealth, *John S. Robb, Esq.*, District Attorney, for a return to the writ presented affidavits in which it was denied that the petitioner had been *duly* discharged under the Act of 16th of June, 1836, § 47, P. L., 740; that he was *not entitled to make application* for his release until he had been in actual confinement for a period of not less than three months after the expiration of the term of his imprisonment, nor was he entitled to a discharge until he had been in actual confinement for a period of not less than three months after the expiration of said term of imprisonment. That the petitioner had not paid the fine and costs imposed upon him by the sentence, nor was he legally discharged under the provisions of the Act of 23d of March, 1872, § 2, P. L., 560. That

he had not exhibited under oath or affirmation duplicate schedules of his property, real, personal and mixed, to the board of managers of the workhouse, nor was he duly discharged by the order of said board.

Mr. Robb, after reading the return, stated to the court that he thought the commitment to the jail was illegal, but suggested that the court might resentence the petitioner to the workhouse.

William Reardon, Esq., for the petitioner (with him *E. C. Montooth, Esq.*), claimed that the discharge from the workhouse was a finality and that there could be no further imprisonment under the sentence.

The Court, *per SHARSWOOD, C. J.*—The commitment is clearly illegal. The prisoner possibly might be committed to the workhouse on a bench warrant, issued by the lower court, but we do not decide that.

Prisoner discharged.

JANE PUSEY, Plaintiff Below, v. THE CITY OF ALLEGHENY.

Under the provisions of Article XVI, Section VIII, of the Constitution of Pennsylvania, corporations to which the right of eminent domain is delegated are liable for consequential damages resulting to private property from the construction, use, or alteration of their works, ways, or other improvements.

A municipal corporation is therefore liable to the property owners through whose land it has caused a street to be opened for compensation, not only for the actual property appropriated for the street, but also for such as it may injure or destroy by such opening.

Where a property owner through whose land a street has been run is injured, both by reason of the taking of part of his land for the construction of said street, and also by reason of the cutting and grading thereof, he must in proceedings to recover damages submit his whole claim to the viewers and the court, and that part thereof which he neglects so to submit must be taken to have been waived and no second process can be had for its recovery.

Seem, that where the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of the damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained in a subsequent proceeding instituted in accordance with the provisions of the Act of May 1, 1876, P. L., 86.

The Supreme Court will not, on error to a judgment in an appeal under the Act of June 13, 1874, P. L., 283, from the report of viewers appointed to assess damages resulting from the opening and grading of a street, take notice of the fact that such grading was done subsequently to the report of the viewers appealed from, where nothing to that effect appears upon the record.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

Appeal by William B. Pusey, and Jane his wife, from a report of viewers appointed by the Court of Quarter Sessions of Allegheny county

to assess damages suffered by Pusey and wife, and others, by reason of the taking of a portion of their property in the opening and construction of Charles street.

The Councils of the City of Allegheny passed an ordinance authorizing the opening of said street on March 12, 1874. The report of the viewers appointed by the court of Quarter Sessions to assess damages and benefits to Pusey and wife, and others, was filed September 11, 1875. On October 9, 1875, Pusey and wife demanded a trial by jury, by virtue of the provisions of the Act of June 13, 1874, P. L., 233, and an order was accordingly made certifying the record to the Court of Common Pleas, No. 2, of Allegheny county. Subsequently this order was vacated, but was reinstated by a decree of the Supreme Court in *Pusey's Appeal*, 2 Norris, 67. The record was accordingly certified, and on March 24, 1877, an issue was framed by order of the court, wherein Jane Pusey, her husband having meantime died, was plaintiff, and the City of Allegheny defendant.

On the trial before KIRKPATRICK, J., the defendant presented the following point:

"3. That the measure of damage is the difference between the value of the property as a whole with the street located thereon, and the property as it was before the street was located, without regard to grades afterwards made."

Answer.—Refused.

The jury under the direction of the court rendered a special verdict as follows:

"We find the damages resulting to the plaintiff over and above all advantages resulting from the opening of Charles street, and the appropriation of the necessary ground therefor and as taken by the City of Allegheny, defendant, and also and in addition thereto resulting from the construction of the said street, its grades, cuts, fills, slopes, walls, etc., to be twelve thousand five hundred dollars (\$12,500). For which amount of \$12,500 we render a verdict for the plaintiff and against the defendant, subject to the opinion of the court upon the question of law reserved, viz: Whether or not there can be a recovery in this action over and above the actual value of the ground taken by defendant for the use of said street, and the location and opening of the same, and if the court should be of the opinion that there can be no recovery over and above the damages resulting from the location and appropriation of the ground actually taken for said street, then judgment to be entered for the smaller amount, viz., the sum of five thousand four hundred and fifty eight (\$5,458) dollars; *non obstante veredicto*."

Subsequently the court entered judgment *non*

obstante veredicto for the plaintiff in the sum of \$5,458. Whereupon plaintiff took this writ, assigning for error the entry of judgment by the court for the amount aforesaid.

For plaintiff in error and below, *Messrs. Thos. M. Marshall and J. S. & A. P. Morrison*.

Contra, W. B. Rodgers, Esq.

Opinion by GORDON, J. Filed November 7, 1881.

Under the 8th Section of the 16th Article of the Constitution of this Commonwealth, municipal, as well as other corporations, in whom are vested the right of eminent domain, are required to make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements. This is an advance upon the limitation of the right of eminent domain, as found in the bill of rights, both of the present Constitution and that of 1838. Corporations in whom the Legislature has vested this right, are, by this section, made liable for damages resulting to private property from the construction, use or alteration of their works, ways or other improvements; in other words to such damages as are ordinarily called *consequential*. This being now the supreme law of the land, it must govern the case under consideration, and it is idle to recur to *decisions* and legislation, the authority of which as to all present and future cases, is, by this provision, annulled. The report of viewers from which the appeal in this case was taken, was filed, as we are informed by the statement of the plaintiff in error, on the 11th of September, 1875, and the ordinance for the opening of Charles street bears date March 12, 1874. Whether the cutting and grading complained of were done between these dates, or subsequently to the former, we do not know, as we have nothing in the shape of a record from which to inform ourselves. Neither, for the same reason, do we know the amount of damages awarded by the viewers, or how they were made up. It is for this reason that we cannot entertain the allegation of the counsel for the defense that there had been no grading done until after the report of viewers, nor his argument, based on this hypothesis, that it was improper for the jury to consider what the viewers could not have passed upon. No such question appears to have been raised in the court below, and we cannot agree to discuss what is not before us.

The third point of the defendant develops the material subject of controversy, and is as follows: "That the measure of damages is the difference between the value of the property as

a whole, with the street located thereon, and the property as it was before the street was located, without regard to grades afterwards made."

This point was refused, and we think, for the reasons already given, it was properly refused. But to this decision the court did not adhere. A special verdict was directed, and the jury found that the damages, resulting over and above all advantages, from the appropriation of the land alone, were \$5,548; that the damages to the remainder of the property, consequent upon the construction of the street, its grades, cuts, fills, slopes and walls, and including the value of the land, were equivalent to the sum of \$12,500. Upon this verdict the court entered judgment for the amount first named, and rejected the larger amount which included consequential damages. This judgment was erroneous. As we have seen, the Constitution in positive terms requires compensation to be made, not only for the private property that a corporation may appropriate to its own use, but also for such as it may injure or destroy. Hence the plaintiff was entitled to recover whatever damages she had suffered at the hands of the city, whether direct or consequential, and the contention that she must divide her claim, and recover for the property appropriated for the street, under the Act of 1870, and for the injury resulting from the cutting and grading by a different process under the Act of 1876, cannot be sustained. Such a method of splitting up damages resulting from a single transaction, and thus multiplying suits, is contrary to all legal policy, neither can it be supported by the act cited. Under this statute, where the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of the damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained by a second view, but not so where both can be assessed at one and the same time. The taking, and the injury to the remaining land form but a single subject of complaint, and for them there can be but one assessment.

From this it follows, that the property owner not only may, but must submit his whole claim to the viewers and to the court, and that part thereof which he neglects so to submit must be taken to have been waived, and no second process can be had for its recovery.

The judgment of the court below is now reversed, and it is ordered that judgment be entered for the plaintiff in the sum of \$12,500, the full amount of the special verdict, with interest and costs.

**R. W. MACKEY'S HEIRS, Defendants Below,
v. ADAIR et al.**

An attorney at law cannot make an agreement to compromise an ejectment suit and provide for deeds of release or assurance to be made by his client without the latter's authority or subsequent ratification. Authority cannot be inferred from the relation of attorney and client.

Per TRUNKEY, J.—It is doubtful whether oral authority would enable an attorney to make such a contract respecting land.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

On the 22d of January, 1828, Ezra G. Nelson made application for survey of what he called an island, in the Ohio river, near the Allegheny river. Nelson's claim afterwards was purchased by John Irwin, to whom a patent was issued. The island, as thus patented, contained nine acres, three roods and twenty perches. On the 28th of November, 1867, the heirs of John Irwin filed a bill at No. 559 November Term, 1867, to perpetuate testimony as to the lines of said island. In that proceeding a pian was proved and filed on behalf of the Irwins, giving the lines of the island as fixed in the patent and claimed by them.

On the 28th of April, 1873, an Act was approved, P. L., 860, entitled "An Act to perfect the title to Kilbuck Island at the head of the Ohio river, north and west of the Point, in the City of Pittsburgh, authorizing and directing the surveyor-general to issue a patent therefor." In pursuance of that act, a patent was issued 29th of April, 1873. The patent thus issued, was for some eighty acres of land, being the original site of Kilbuck Island, including the alleged Nelson Island, together with land on its south side, and on its north side up to Bank lane, or South avenue. The title to one-sixth of the land embraced in this patent, afterwards became vested in Robert W. Mackey.

At No. 350 November Term, 1874, an action of ejectment was brought for Kilbuck Island by the parties claiming under the patent of 1873, against the City of Allegheny and the Irwins. On the trial of that action the following agreement was entered into:

"It is agreed between the plaintiffs in this case and the heirs of John Irwin, defendants, in order to compromise the question between them, that a verdict shall be entered in favor of the said heirs of John Irwin, and against said plaintiffs, for all the land described in said writ, lying east of a line commencing at a point on Bank lane, now South avenue, 136 feet eastwardly from the eastern line of Borland alley, and running thence on a line parallel with School street, to the Allegheny river.

"And in case said plaintiffs shall succeed in establishing a title to the land described in said writ, not included in the claim of said Irwin's heirs, or to any part thereof adjacent thereto, the said Irwin's heirs shall release or otherwise assure to said plaintiffs, all their interest in all land described in said writ west of said line. And said plaintiffs shall release or otherwise assure to said Irwin's heirs, all their interest in all land described in said writ east of said line. The intention of this agreement being to fix a division line between said parties, in case said plaintiffs shall establish a title to any part of the same adjoining said Irwin's claim, and in case of failure so to establish their title, not to conclude Irwin's heirs as to their title, or the extent of their claim against any other parties."

HAMPTON & DALZELL,
Attorneys for Plaintiffs.

S. H. GEYER,
Attorney for Plaintiffs.

S. SCHOYER, Jr.,
Attorney for Plaintiffs.

R. S. WOODS,
Plaintiffs' Attorney.

DAVID W. BELL and SLAGLE & WILEY,
Attorneys for Irwin's heirs.

No verdict was rendered in favor of the Irwin heirs. Mr. Mackey was a resident of Philadelphia at the time of the trial. He had employed no attorney to represent him in the ejectment, and as soon as the agreement was called to his attention, repudiated it. The case resulted in a verdict in favor of the plaintiffs. A writ of error was taken by the City of Allegheny. The case is reported in 30 P. F. S., 118.

On 2d November, 1878, this ejectment was brought, in which the plaintiffs claimed all the land from Bank lane to the river. The agreement was not contained in plaintiffs abstract. They were allowed, however, to offer it, and the court charged that it was binding on the heirs of R. W. Mackey, and a verdict was rendered accordingly, for the land contained within those lines. This writ of error was then taken on behalf of Mr. Mackey's heirs. The errors assigned were:

1. Admitting the following offer made by plaintiffs, viz: "Plaintiffs' counsel also offer an agreement made in said ejectment case, and signed by counsel representing all of the defendants."

2. Charging the jury as follows: "If the compromise agreement in evidence was made during the progress of the trial of the case of *Moorhead et al. v. Allegheny City et al.*, No. 350, November Term, 1874, by the counsel representing all the plaintiffs in that action, and

was authorized and sanctioned by the plaintiffs present in court conducting said action for themselves and the other plaintiffs, it is binding upon Mr. Mackey's heirs, although he may not have been actually present or known of the agreement at the time, and may, after the trial, have said he repudiated said agreement."

For plaintiff in error, defendants below,
Messrs. Rodgers & Oliver.

Contra, Messrs. Slagle & Wiley.

Opinion by TRUNKEY, J. Filed November 21, 1881.

R. W. Mackey and others brought ejectment against the City of Allegheny and the heirs of John Irwin, for a tract of land, the whole of which was claimed by the City, and a defined part by Irwin's heirs. At the trial, the respective attorneys for the plaintiffs and for the heirs of Irwin, in order to compromise the question between them, agreed that a verdict should be entered in favor of said heirs for all the land lying east of a specified line; and if the plaintiffs should recover the land not included in said Irwin's claim, they should release to said Irwin's heirs all their interest in the land east of said line; and said heirs should release to the plaintiffs all their interest in the land west of said line. It was intended to fix a division line between the parties, in case the plaintiffs should establish title to any part of the land adjoining Irwin's claim, and in case of their failure, not to conclude Irwin's heirs as to their title or the extent of their claim against other parties.

The court instructed the jury that the agreement is binding upon Mackey's heirs, although he was not present and did not know of it at the time, and, after the trial, may have said he repudiated it; and this ruling constitutes the alleged error.

An attorney at law has very extensive powers and may do those things which pertain to the conducting of the suit. Unless otherwise expressly instructed by his client, he may use his own judgment in selecting the form of action and in shaping the issue, also whether it shall be tried by a jury, by the court, or some other tribunal provided by law. On a mere question of boundary, where title is not involved, in open court, he may agree to its submission to the final determination of arbitrators: *Evars v. Kamphaus*, 9 P. F. S., 379. He may refer his client's cause to arbitrators with an agreement that the award shall be final; but the client may revoke the submission, and, in a proper case, he may have relief by application to the court: *Wilson v. Young*, 9 Barr, 101. In Pennsylvania, from an early day, arbitration has

been a favorite mode of trial, and it may be implied by the relation that the attorney has authority to make such agreements for reference; but it does not follow that he can make compromise agreements for his client, or settle a boundary himself.

An attorney has no authority to make a compromise by which his client shall take land instead of money: *Huston v. Mitchell*, 14 S. & R., 307. Where the attorneys of the respective parties make an agreement in the form of an award, settling an ejectment, it will not authorize judgment accordingly: *Stokely v. Robinson*, 10 Cas., 315. In that case **WOODWARD, J.**, held that counsel have no power to compromise their client's case, without the client's authority or sanction.

Here, the agreement is a compromise, and provides for deeds of release or assurance to be made by the clients. It is doubtful whether oral authority would enable an attorney to make such a contract respecting land, though if the client were present at its making, or afterwards recognized and acted upon it, he would be bound. It was not in the course of the conduct of the suit, nor could such agreement be anticipated by the client as likely to be made in any issue of fact or of law, or in any known mode of trial. Authority to make it cannot be inferred from the relation. No precedent has been cited in this State, or elsewhere, which sustains a compromise of this nature, by an attorney without his client's authority, or subsequent ratification; and we are of opinion that it would be dangerous to clothe the attorney with such power over his client's property.

Judgment reversed and venire facias de novo awarded.

TERANCE MURPHY, Plaintiff Below, v. J. McDONALD CROSSAN.

Where there was evidence that the defendant, a hotel proprietor, had been notified sometime before an accident, that the wire rope used for the baggage elevator was worn out, it was error to nonsuit the plaintiff, who was injured through the breaking of the rope, although there was evidence that the defendant, on receiving such notice, had ordered a new rope, but continued to use the old one without notice to plaintiff that it was unsafe.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

The plaintiff in error had for some years been a porter in the Monongahela House, Pittsburgh, of which the defendant was proprietor. He had charge of the taking up and bringing down of baggage on the elevator used for that purpose. In April, 1877, while the elevator was descending, bearing plaintiff, two trunks, of about three

hundred and fifty pounds each, and some small baggage, the wire rope by which the elevator was moved, broke and fell about thirty-seven feet, injuring the plaintiff, and for the injuries thus sustained this suit was brought. There was evidence that some six or eight weeks previous to the accident, the engineer had reported at the office of the hotel that the rope was getting bad, and that the defendant would have to get a new one; also, that eight or ten days before the elevator fell, the engineer told the defendant that he would have to get a new rope, as the one in use was worn out, and he replied that he had seen it and that he had ordered one.

After proof of the above facts, the defendant moved for a judgment of a peremptory nonsuit for the following reasons: (1) There is no sufficient evidence that the defendant was guilty of negligence when the plaintiff was injured. (2) The plaintiff had a better opportunity of knowing the condition of the elevator and rope than the defendant.

The court granted the motion and the refusal to take it off the nonsuit was assigned for error.

For plaintiff in error and below, *Messrs. Breil & Fitzpatrick and R. B. Parkinson.*

Contra, Hon. Thos. M. Marshall.

Opinion by **PAXSON, J.** Filed October 24, 1881.

We think it was error to nonsuit the plaintiff. There was evidence that the defendant had been notified sometime before the accident, that the wire rope used for the baggage elevator was worn out. The defendant replied that he had seen it; the rope was bad, and that he had ordered a new one. In the meantime he continued to use the old rope, and so far as the testimony shows, without any examination to ascertain whether it would be safe to use it until the arrival of the new one, and without informing the plaintiff, who was a baggage porter employed in taking baggage up and down on the elevator, that it was unsafe, or giving him any caution to use it with more care, or carry lighter loads. It is to be observed that the rope was so situated that the plaintiff could not see it or judge of its condition.

Under these circumstances we think the defendant assumed the risk of the breaking of the rope. It is true he was not an insurer of its soundness. He is to be held to the rule of reasonable care, and may be able to satisfy a jury that he has done all that such a rule requires. All we decide is that the evidence was sufficient to carry the case to a jury.

Judgment reversed and a venire facias de novo awarded.

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PITTSBURGH, PA., DECEMBER 14, 1881.

Supreme Court, Penn'a.

JOHN HUCKENSTEIN, with Notice to THOMAS McKEE, Defendant Below, v. C. H. LOVE, for use of ISABELLA W. C. COMINGO.

Two years after a *scire facias* sur mortgage had been put at issue an application was made to the court by the plaintiff to have added as a defendant, McKee, who had purchased the mortgaged premises at judicial sale, the court granted the application and ordered process to issue to bring him in. Subsequently an interlocutory judgment was taken against him without his knowledge. At the trial, counsel moved to have his name stricken off as a defendant, which motion the court refused. *Held*, to have been error; the judgment having been erroneously entered McKee had a right to demand that it be stricken off.

Huckenstein, the original defendant in the action, pleaded and offered to prove usury, which offer of evidence was rejected. *Held*, to have been error; that he was the defendant in the issue and interested in the result even if the title had passed to McKee.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This was a *scire facias* sur mortgage and the action when brought was entitled *C. H. Love, for use of Isabella W. C. Comingo, v. John Huckenstein*. The mortgage was in the penal sum of \$16,000 conditioned for the payment of \$8,000 in four years from July 16, 1870, with interest. Huckenstein filed an affidavit of defense, alleging that usurious interest had been charged and there was due only \$6,720. The cause was put at issue on December 13, 1877. January 10, 1880, the plaintiff presented a petition setting forth that in March, 1879, the premises described in the mortgage had been sold at sheriff's sale, bought by one Thomas McKee, to whom a deed had been delivered, and praying that he be added as a defendant. The court granted the prayer of the petitioner and directed a process to issue to bring in McKee. [First assignment of error]. Plaintiff then issued an *alias* and subsequently a *pluries scire facias* and took judgment against McKee, on two returns of *nihil*, on May 17, 1880. On December 13, 1880, this judgment by leave of court was stricken off. On January 15, 1881, an interlocutory judgment was entered "in default *sec. reg.* against Thomas McKee without prejudice to the rights of plaintiff to have final judgment" against McKee and Huck-

enstein. [Second assignment of error]. On January 17, 1881, the case was called for trial when McKee, who had been summoned as a witness, learned that he was a party to the action. His counsel then moved to strike off the order making him a party to the action for the following reasons:

1. As shown by the petition filed in support of said order, the alleged title in said Thomas McKee was acquired long after the suit was brought in this case.

2. The said order was made without notice to the said Thomas McKee.

3. As appears by the record a *scire facias* and *alias scire facias* were issued without notice, and no service of the same were made upon him and a judgment entered against him by default, although he has been all the time since the issuing of said writs a resident of said county.

The court refused the motion, entering the following order:

And now, January 17, 1881, the above motion is refused, but if Mr. McKee desires to defend in this action, he being now in court and his counsel also present, if he will make a motion to open or set aside the judgment against him, so as to let him into a defense, such motion will be sustained and he will be allowed to defend. His counsel declining to make such motion, it is ordered that the jury be sworn against John Huckenstein, with notice to Thomas McKee, terre-tenant, and to assess as against him the balance due on the mortgage. [Sixth assignment of error].

The jury were then sworn as to both defendants. The plaintiff having made a *prima facie* case, the defendant's made the following offer of evidence, Love being on the witness stand:

"Defendant's counsel propose to ask the witness if he had any interest in this mortgage. The purpose of the offer being to show that he was merely a broker, borrowing money on this mortgage for John Huckenstein from the assignee of the mortgage, Mrs. Comingo.

"Objected to—first, because it appears that the title has passed out of John Huckenstein, and he has therefore no further interest in this transaction, there being no attempt to impeach the deed to Thomas McKee of his interest to the property described in the mortgage.

"Secondly, because otherwise irrelevant and incompetent. Plaintiff's counsel hereby agree that if there should be a suit on the bond, the adjudication in this case shall not operate as a bar to the defense of usury if there be one, and further agree to file a stipulation to that effect, if desired.

"Defendant's counsel reply to the above ob-

jection that counsel for the plaintiff has no power to make any such stipulation for his client who is not present; that we demand his warrant of attorney to that effect, and that the promise to file a stipulation is no execution of a stipulation and would not protect defendant. We therefore object to it."

The court excluded the offered evidence. [Fourth assignment of error].

Defendants then made the following offer, McKee being on the witness stand:

"Defendant's counsel proposes to prove by the witness that on the day of the sale of the property purchased by him, he saw John Huckenstein, who was lying sick, confined to his room from an injury that he had received, and could not get out to attend to it; that Mr. McKee proposed that he would come over and see to the matter for him, which he did; that the property was put up for sale; that he bid \$300 on it, and it was knocked down to him; that he went back and told Mr. Huckenstein that he had been acting for him; that the purchase was for him, and that no title should pass or ownership should exist as by reason of the sale. This was in March, 1879. The matter lay over until June, when the sheriff acknowledged the deed. Mr. Huckenstein paid \$300 to the sheriff or gave it to Mr. McKee to pay, which he did, and lifted the deed and took it over the same day and handed it to Mr. Huckenstein; that Mr. McKee has and claims no title in the property at all, and that he merely acted in the matter for the accommodation and assistance of Mr. Huckenstein, who was unable to attend to the matter for himself at the time.

"Plaintiff's counsel objected to the offer—first, because the testimony is inadmissible under the statute of frauds; secondly, because it shows simply that the title passed through Thomas McKee, who became the purchaser thereof, and seized of the title thereof under a valid deed from the sheriff, and therefore Huckenstein would take the title *cum onere* and stand in the shoes of McKee, who cannot defend on the ground set up here; third, because the offer of testimony shows a fraud upon creditors, which would make a title as it now exists in Thomas McKee binding upon John Huckenstein, who could not recover the property from McKee upon the facts embraced in the defendant's offer; and fourth, because the testimony is otherwise incompetent and irrelevant.

"Defendant's counsel, following the plaintiff's course, also propose in support of the offer on behalf of Mr. McKee, who is present in court and now on the witness stand, to file from him upon the record a stipulation, in writing, agree-

ing that he acquired and took no title by that conveyance, and that John Huckenstein, and his heirs and assigns, shall stand seized of the same as firmly as against him and his heirs and assigns forever.

"To this further offer plaintiff's counsel renew the objections already made, and also make the further objection that the proposed paper would barely amount to a declaration of trust, and so far as it would be operative as a conveyance of the title, Huckenstein would still take *cum onere* and stand in the shoes of Thomas McKee."

The objections were sustained. [Fifth assignment of error].

There was a verdict for plaintiff and against McKee and Huckenstein for the full amount claimed and they took this writ.

For Huckenstein, plaintiff in error, defendant below, *Messrs. Barton & Son.*

For McKee, *T. C. Lazear, Esq.*
Contra, J. M. Stoner, Esq.

Opinion by TRUNKEY, J. Filed October 31, 1881.

When this action was commenced and until more than a year after the issue was formed by the pleadings, McKee was a stranger to the title of the mortgaged premises. Therefore, his name was not omitted by mistake—it would have been a mistake to have included it. He purchased the premises at sheriff's sale, pending the suit, and if he acquired the title he took subject to the mortgage and all the consequences of a judgment in the action. The plaintiff had no interest in making McKee a party defendant, for this was unnecessary to a trial on the merits. It could not forestall Huckenstein's defense. Nor would it prevent the plaintiff giving in evidence the fact of the sheriff's sale to repel a defense which such sale would repel, to omit making the purchaser a party to the record. The amendment was not within the letter or spirit of the statute. And, had McKee's name been properly added, there was no service to authorize judgment against him in default of appearance. By a curious growth in the law of practice, two returns of *nihil* upon writs of *scire facias*, whether the mortgagor be living or dead, authorizes judgment in default, but this has not been extended so as to embrace persons who are not parties to the mortgage. Although but little injury may have been done to McKee he was put to some trouble to ascertain if the vexatious and irregular judgment would injure him. He had right to demand that it be stricken off, for it was erroneously entered. It differed from a regular judgment which being without

error in the proceeding, will not be struck off, but may, in the discretion of the court, be opened.

At the trial Huckenstein proposed to prove that Love, the assignor of the mortgage, was merely the broker and that Mrs. Comingo, the assignee, was the real lender of the money. This offer was overruled for the reason that Huckenstein's title to the premises had been vested in McKee, and the testimony was irrelevant and incompetent. Then the defendant proposed to prove that at the sheriff's sale McKee was acting for and purchased for Huckenstein; that he paid the bid to the sheriff with Huckenstein's money; that he agreed that no title should pass to him and he claimed none, and that he had acted in the matter to assist Huckenstein who was physically unable to attend to it himself. This also was rejected. If true, McKee had only a naked legal title and could have been compelled to convey to Huckenstein, had he refused to convey on demand. He was a trustee without interest, and with no duty, except to convey the legal title to the actual owner of the land.

Huckenstein had filed an affidavit of defense setting out the alleged usury and facts entitling him to defalcate it. He pleaded usury, and payment with leave to prove the facts stated in the affidavit. The issue related to the usury in the plaintiff's claim and the burden of proof was upon the defendant. The offers of testimony aforesaid, especially the first [fourth assignment of error], were pertinent to the issue, and the refusal of the first for the reason given, made the second [fifth assignment of error] material. Unless the defendant adduced proof tending to establish that Mrs. Comingo loaned the money to Huckenstein his defense would fail. His affidavit averred this fact. The offer to prove it could only be understood with reference to the parties and the issue. The plaintiff's counsel understood it, and, with his objections, proposed to stipulate that the judgment in this case should not bar the defense of usury in a suit on the bond. It would have been useless for the defendant to have formally offered proof of the usury after the groundwork for its reception had been rejected. The fourth and fifth assignments must be sustained.

In view only of the prior rulings in the case, can it be said that the offer set out in the fifth assignment was admissible. In truth, Huckenstein was the defendant in the issue and was interested in the result, even if the title had passed to McKee. The doctrine in *Miners' Trust Co. v. Roseberry*, 31 P. F. S., 309, does not apply to an action against the mortgagor. How could he defend for usury in a suit on

the bond after an adjudication that its whole amount was due upon the mortgage?

Judgment against Thomas McKee reversed, and judgment against defendant, Huckenstein, reversed and venire facias de novo awarded.

◆ ◆ ◆
**F. KAISER, Defendant Below, v. C. R. FEND-
RICK et al.**

It was averred in an affidavit of claim that a note was given by a member of the partnership suing in fraud of the other partners and without any consideration, either to the firm or to themselves individually. The affidavit of defense averred that the defendant gave a full and valuable consideration for the note, which consideration was received by the plaintiffs and became assets of their firm. *Held*, a sufficient traverse under a rule of court which provides that "such items of claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted."

Error to the Court of Common Pleas, No. 2, of Allegheny county.

During the summer of 1880, Bardoe, Fried & Miller, a firm engaged in the manufacture and sale of certain articles of merchandise in the City of Pittsburgh, purchased from F. Kaiser, the plaintiff in error, a horse for the sum of \$135, giving therefor the promissory note of the firm. Prior to the maturity of this note the said firm was dissolved, Miller—one of its members—at once forming a co-partnership with the defendants in error, under the firm name of Miller, Fendrick & Co. The object or purpose of the last mentioned co-partnership was the same as that of Bardoe, Fried & Miller.

After the formation of the new co-partnership, and before the aforesaid note had matured, Miller, with the concurrence of his former co-partners, proposed to Kaiser the surrender of the note and the cancellation of the contract between him and the old firm. He (Miller) further proposed that, as the new firm needed a horse in its business, the one theretofore sold to Bardoe, Fried & Miller be turned over to Miller, Fendrick & Co., and the note of the said firm be given therefor. To these propositions Kaiser assented, and accepted the promissory note of said last mentioned firm in payment for his horse, which at once became assets of the firm, and was used and enjoyed by them in the conduct of their business. Sometime after receiving the last mentioned note, Kaiser indorsed the same for value to John Eurich, of Pittsburgh, who at its maturity, by reason of non-payment, brought suit against the makers—Miller, Fendrick & Co.

Within a few days after the entry of suit by Eurich, the defendants paid to him the amount

of the note, interest upon the same and costs of protest and suit, the plaintiff (Eurich) at the same time, and at their request, entered satisfaction of his claim, discontinued his suit, and returned the note to them as a receipt or voucher.

Thereupon the defendants in error, without joinder of their co-partner, Miller, instituted this action, in assumpsit, as indorsees of the protested note, of which they were the makers and payors. The *narr.* also contained the common counts.

A rule was subsequently granted in the lower court to show cause why judgment should not be entered for want of a sufficient affidavit of defense. The principal reason assigned of its insufficiency was "that it contains no direct or specific traverse or denial of any material averment in the affidavit of claim, nor any averment of matter sufficient in avoidance of the plaintiffs' claim." Upon the argument of the rule, and consideration thereof by the court, the same was discharged.

The trial of the cause was had before KIRKPATRICK, J., who had previously presided upon the argument of the rule.

At the trial, the plaintiffs' counsel proposed to read, as admitted under the rule certain portions of the affidavit of claim which, they alleged, were not specifically and directly traversed in the affidavit of defense. This offer was met by the objection that all of the material averments in the affidavit of claim were denied in the affidavit of defense. The objection was overruled and the evidence received. [First assignment of error].

Plaintiffs' counsel then offered in evidence the aforesaid note of Miller, Fendrick & Co., with notice of protest attached, which was admitted under objection. [Second assignment of error]. No evidence was offered by plaintiffs in support of the common counts in the *narr.*

A motion for a compulsory nonsuit was overruled and defendants' counsel then proposed to prove by Kaiser substantially the facts before stated in relation to the sale of the horse and its subsequent use and enjoyment by Miller, Fendrick & Co., the giving of the note therefor and its negotiation for value, before maturity without notice, etc., which offer was rejected. [Third assignment of error].

Defendant's counsel requested the court to charge the jury "that under the pleadings and evidence in the case the plaintiffs are not entitled to recover," which request was refused. [Fifth assignment of error].

The court thereupon gave peremptory instruction to the jury to find a verdict for the plaintiffs. [Sixth assignment of error].

The fourth assignment of error is as follows: "The court erred in refusing to allow the defendant to prove the facts contained in his second offer, in the following words, to wit: "Defendant's counsel propose to prove that the witness (F. Kaiser) sold to Miller, Fendrick & Co., a horse, and that he received the firm note of Miller, Fendrick & Co., in payment for it; that he indorsed the note so received, before maturity, and without knowledge that the same was not given in the course of partnership business."

For plaintiff in error, defendant below, *Messrs. Powers, Force & Powers.*

Contra, Messrs. John A. Wilson and John G. Bryant.

Opinion by STERRETT, J. Filed October 31, 1881.

The subject of complaint in the first specification is that certain material averments of fact contained in the affidavit of claim were erroneously received in evidence, and treated as admitted facts, under the rule of court which provides, "That in all actions on notes * * * and in all actions founded on contract, express or implied, * * * where the debt or damages can be liquidated without the aid of a jury, the plaintiff shall file with or before his declaration, a specification of the items of claim together with a statement of facts necessary to support it, verified by affidavit, to which the defendant shall * * * file an answer, verified by affidavit; and such items of claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted." Rule 1, Section 1. Under this rule the plaintiffs below filed a full affidavit of claim, in which, after averring that the defendant is justly indebted to them in a certain sum, they proceed to state the facts out of which that indebtedness arose. These averments of fact, constituting the body of the affidavit, were received in evidence under the rule above quoted; and, assuming them to be true, it must be conceded they disclose a good cause of action. The most essential of these averments is that Miller, who with plaintiffs below, composed the firm of Miller, Fendrick & Co., made a note, in the firm name, to the order of defendant below, and delivered the same to him "without the knowledge or consent of the said plaintiffs, and not in any manner for, on account of, or in the course of the business of the firm; but the same was so made and delivered for a debt of the said Miller and others (not the said plaintiffs), formerly co-partners, in the name and style of Bardoe, Fried & Miller, to the said defendant,

for the price of a horse sold by him to them, for which he held the note of the said Bardoe, Fried & Miller, and for which neither the said firm of Miller, Fendrick & Co., nor the said plaintiffs or either of them ever became or was liable; that the said defendant indorsed and delivered the said note as and for the note of the said firm of Miller, Fendrick & Co., to one John Eurich."

The substance of the remaining averments is that by the indorsement to Eurich he became a *bona fide* holder of the note without notice of the fraud committed by Miller against his co-partners, the plaintiffs below, and that after the note was duly protested for non-payment they paid the amount thereof to Eurich and he transferred the note to them.

It will be observed that the essential allegations of fact, upon which the case of the plaintiffs below hinges, are that the note in question was given by their partner, Miller, in fraud of their rights as members of the firm and without any consideration therefor passing either to them or to the firm of which he and they were the members. If the averments of which this is the substance were eliminated from the affidavit there would be nothing left out of which to construct a valid claim against the defendant below. His contention is that these essential averments of fact were traversed and denied as required by the rule of court, and therefore they should not have been taken as admitted facts against him without competent proof. In his answer or affidavit of defense, after averring that he has a full, just and legal defense to the whole of the plaintiffs' claim, he says: "The note referred to in plaintiff's affidavit of claim * * * was given to the said defendant by the makers thereof and by the said defendant indorsed to John Eurich before maturity and in the usual course of business, without notice or knowledge that the same was not made or given for, on account of, or in the course of the business of the said firm of Miller, Fendrick & Co., and that for said note a full and valuable consideration was given by said defendant to the said makers, which consideration was received by said firm of Miller, Fendrick & Co., and became assets of said firm." He further avers "he is not indebted to said plaintiffs or either of them, or to the firm of Miller, Fendrick & Co., in any sum or form whatsoever."

While the affidavit of defense, in some of its averments, is lacking in clearness and precision, and may even be regarded as evasive, it contains a positive averment that the defendant below gave the makers, Miller, Fendrick & Co., a full and valuable consideration for the note in

question, which consideration was received by them and became assets of their firm. This is substantially a traverse and denial of the most essential allegations of fact contained in the affidavit of claim, and is sufficiently direct and specific to answer the requirements of the rule. It is not necessary that the denial should be in the words of the affidavit of claim. The averment of the defendant below that the makers, Miller, Fendrick & Co., received from him a full and valuable consideration for the note in question, is surely a denial of the plaintiffs' averment that it was given by their partner Miller in fraud of their rights and without any consideration, either to the firm or to themselves individually. Some of the material averments were traversed and denied and there was, therefore, error in admitting them as evidence under the rule.

If competent testimony tending to prove the material allegations of fact upon which the plaintiffs' case hinged, had been first introduced there could have been no question as to the admissibility of the note and certificate of protest; but, as we have seen, in considering the first assignment, portions at least of the affidavit of claim were improperly received as evidence of the allegations therein contained and hence there was no legal ground laid for the introduction of the evidence complained of in the second assignment of error.

The third assignment of error is not sustained. The proposition contains no offer to prove that plaintiffs below, as members of the firm or in any other capacity, assented to the assumption or payment of the debt originally contracted by Bardoe, Fried & Miller. Neither the fact that defendant below was informed of their consent by Miller, nor the further fact that the horse was taken and used by the plaintiffs' firm in their business, would be evidence of their consent. Nor was it a matter of any consequence that the defendant below received the note of the firm "from Miller, without knowledge that any objection was raised thereto by the remaining members of the partnership." He had no right to take the note from Miller for the debt of another firm, with which plaintiffs below had no connection, without first ascertaining that it was given with their consent. He knew or ought to have known, that Miller had no right to thus use the name of his firm without the express consent of his partners. It is no answer for him to say he was ignorant of the fact that they had not assented to such use of the firm name, or that he was informed by Miller that they had assented. It was his duty to refuse the note until he knew affirmatively that their

consent had been given. If, by his neglect of duty, he assisted Miller in committing a fraud on his partners, he has no just reason to complain if he is compelled to make good their loss.

The subject of complaint in the fourth assignment is the refusal of the court to permit the defendant below to prove the sale of a horse to Miller, Fendrick & Co., and the receipt of the note, in controversy, in payment therefor. This state of facts is inconsistent with the offer covered by the third assignment, but that did not justify the rejection of the testimony. It must be presumed that the defendant made the offer in good faith, and that he was prepared to prove the facts therein contained. As we have already seen, he had alleged in his affidavit of defense that Miller, Fendrick & Co. received from him "a full and valuable consideration" for their note. The facts which he offered to prove were therefore strictly in the line of the defense thus disclosed. If the testimony had been received and submitted to the jury and they had found that the note was given by the firm for a horse purchased by them in the course of their business, the defendant below would have been clearly entitled to their verdict. There was, therefore, error in excluding the testimony embraced in the offer.

The instructions complained of in the fifth and sixth assignments legitimately resulted from the admission of the affidavit of claim in evidence, and the rejection of the testimony referred to in the last preceding specification, and were consistent with the ruling of the court on these questions of evidence.

Judgment reversed and venire facias de novo awarded.

W. R. & F. M. RECK, Plaintiffs Below, v. E. C. CLAPP.

A forged deed will not pass the title which it assumes to convey as against one who has no participation in, or knowledge of the forgery.

A person who relies on the recorded evidence of title takes the risk of the actual state of the title corresponding with that which appears of record.

Arrison v. Harnstead, 2 Barr, 191, and *Wallace v. Harnstead*, 3 Harris, 462, approved and followed.

Error to the Court of Common Pleas of Clarion county.

The plaintiffs in error brought two actions of ejectment to recover from the defendant the undivided one-fourth of two several tracts of land, containing some twelve hundred acres, and both cases depending on the same title were tried by consent before the same jury. They claimed that the title to the land became vested

in one James W. Guthrie by a conveyance from the executors of John M. Fleming, deceased, dated September 6, 1872, made under a decree of the Orphans' Court of Clarion county, for the specific performance of a contract, dated January 13, 1872.

On August 6, 1875, the plaintiffs obtained a judgment against Guthrie. There was a stay of execution until July 9, 1878, and after expiration of the stay the interest of Guthrie was sold at sheriff's sale, purchased by plaintiffs and a deed made to them on November 23d, and acknowledged on December 5, 1878.

The defendant also claimed title under James W. Guthrie and offered in evidence an exemplification of a writing or a deed of assignment from Guthrie to one Hugh Maguire, recorded in the Recorder's office for Clarion county, on the 29th day of March, 1877, and purporting to have been dated and acknowledged the 20th day of December, 1874. He followed this writing by a writing reassigning and transferring back the said deed and interest in land mentioned therein by Hugh Maguire to J. W. Guthrie, dated February 1, 1877, and acknowledged same date, and recorded March 29, 1877, and followed this by deed from Guthrie and wife to the defendant, dated February 3, 1877, for the same interest conveyed in the deed of Fleming's executors to Guthrie.

In rebuttal plaintiffs offered evidence to show an alteration in the date of the deed of Guthrie to Maguire, and also in the acknowledgment, the witness testifying that the figure 4, in 1874, stood over a partially erased figure. The justice of the peace who took the acknowledgment swore that it was acknowledged about February, 1877.

The court substantially instructed the jury that the defendant was an innocent and *bona fide* purchaser, and the jury returned a verdict for the defendant. The plaintiffs then took this writ, assigning the following, *inter alia*, for error:

6. Error in affirming defendant's second point, which was as follows: "That the line of title as shown from the books in the Recorder's office, given in evidence in connection with the deed from Guthrie to Clapp, show the title to the land in dispute to be vested in Clapp, the defendant."

7. Error in affirming defendant's third point, which was as follows: "That a *bona fide* purchaser for value takes a title discharged of every fraud or secret equity on part of his predecessors in title, of which he had no knowledge or notice."

9. The court erred in the answer to defend-

ant's seventh point: "That if J. M. Fleming in 1870, by Guthrie, as his agent, executed the paper of the 28th of June, 1870, and in 1872 to carry out the purposes of that paper, Fleming conveyed to Guthrie, and Guthrie conveyed the land to Maguire in pursuance of the trust reposed in him by Fleming, the date of the deed of Guthrie to Maguire, or the date of its acknowledgment under the evidence are immaterial in this case, and, if the jury so find, their verdict should be for the defendant."

"Answer.—Gentlemen, now be careful on this point, because here is the second general view of the case. It is referred to by both parties in their arguments—referred to in several of the points. In some measure by the points put by the plaintiffs because this is a summing up of the second general line of defense set up by Clapp." [Defendant's seventh point read].

"We answer this point in the affirmative. This is the second general point. Now, this is denied by the plaintiffs. It is affirmed by the defendants. They say that the property was conveyed as a mortgage to Maguire in 1870; that he held that paper; they say that Guthrie testifies that the deed made by administrators to him was made for the purpose of enabling him to carry out in good faith to the mortgagee the trust that he had in the land, and they say, if that be so, that there was a mere trust relation between Guthrie and Maguire and the Flemings, and that a judgment would not attach to it, and the sale would be good for nothing and pass no title. We say that is the law if the facts be so found. But the plaintiffs in the case say that is not so. They say that is not so and that the evidence does not justify the jury in forming that conclusion. Taking the evidence and all the papers in the case, they say that Guthrie is mistaken about that. Now we leave you to determine under the evidence which has the right of the issue.

For plaintiffs in error and below, *Messrs. W. L. Corbett and Boggs & Weidner.*

Contra, Messrs. Wilson & Jenks.

Opinion by GREEN, J. Filed November 7, 1881.

The second point of the plaintiffs was in the following words: "If the jury find from inspection and other evidence that the date of the assignment or transfer by Guthrie to Maguire of his title deed for the land in controversy, and also the date of the acknowledgment thereof were erased, mutilated and changed on the paper itself from December 20, 1875, to December 20, 1874, it would render such assignment or transfer fraudulent and void, and being in the

direct line of his title, defendant was bound to take notice of it, and if he failed to do so he is not an innocent purchaser without notice, and the verdict of the jury should be for the plaintiffs for the land in controversy."

The hypothetical facts of this point were an absolute obliteration of the actual date of an instrument conveying title to land, and the substitution in place thereof, of an anterior and false date. Beyond all question such an alteration of such an instrument would be a forgery as against any person affected by the change, and who was not a party or privy to it. The plaintiffs claim to be, and apparently are, such persons. They acquired title by purchase at sheriff's sale under a judgment entered August 6, 1875. Whatever title Guthrie, the defendant in that judgment, had on that day, in the land in controversy, passed to the plaintiffs by their purchase. This gives them a sufficient interest to question the condition of Guthrie's title. Now the legal effect of the alleged alteration was to divest Guthrie's title as of August 6, 1875, by subjecting it to the operation of a transfer dated December 20, 1874. He held title by a deed in fee simple, dated September 6, 1872, which on its face contained no conditions or qualifications. But the defendant Clapp claims to have been, and apparently is, an innocent purchaser for value of Guthrie's title as it stood on the record. Feted by the record alone his claim would be good because that afforded no evidence of the forgery. In this condition of things the plaintiff's second point was put in order to charge the defendant with the effect of the forgery, for the reason that the forged instrument was itself a link in his chain of title. He does and must claim title directly through that paper. The question is reduced to one of the plainest and simplest character, to wit: does a forged deed pass the title which it assumes to convey, as against one who has no participation in, or knowledge of the forgery? Of course it can accomplish no such result.

The second point of the plaintiffs was answered by the court below by their saying, in effect, that the defendant would not be affected by the forgery because he could assert the rights of an innocent purchaser without notice, if he used reasonable diligence to obtain access to the original papers, but without success, and the title, as recorded, was fair and free from blemish. The consequences of such a doctrine would be of a most serious character if it received the sanction of the courts. For there it would only be necessary for the forger of a deed or mortgage, after having it placed on record, to lose or

destroy the original instrument and convey his title to an innocent third person for value, pretending to him that the original paper was mislaid and would be subsequently delivered. Of course a purchaser who examines the records is protected by them as far as they can protect him, but he necessarily takes the risk of having the actual state of the title correspond with that which appears of record. The language of this court in the case of *Arrison v. Harmstead*, 2 Barr, 191, fully illustrates this subject. "A deed, good in its creation, may become void by matter *ex post facto* as by interlineation, erasure, or by alteration in a material part. But a deed may be good in part and void in part. It may be good against one person and void against another" * * * "It is said that Mrs. Lewis is a *bona fide* purchaser without notice, and that the action may be sustained on that ground. But conceding that she is, her situation is no better than the fraudulent grantor's. Although the title of the grantor was, in its inception good, it became entirely void by matter *ex post facto*. At the time of the assignment, the title being avoided, the assignor had nothing to convey; of course nothing passed to the assignee. It may be, and perhaps is, a hard case. Fraud may be committed on an innocent purchaser, who may find it difficult to guard against imposition. This is conceded; but it is far better to encounter this risk than to give the least countenance to any alteration whatever of a solemn instrument of writing, which would certainly be the result, if the guilty party could escape the consequences of his fraud by a transfer, to a person who might assume the garb of an innocent purchaser for a valuable consideration. We cannot lay too many restraints upon trick, artifice and fraud." In *Van Amringe v. Morton*, 4 Wh., 382, it was held, that if a deed which has been executed and acknowledged by the grantor with a blank for the grantor's name be surreptitiously and fraudulently taken from the grantor's house, and the blank filled up, no title passes thereby; and a *bona fide* purchaser for a valuable consideration from the person holding the deed stands in no better situation than such fraudulent holder. In the case of *Wallace v. Harmstead*, 8 Wright, on page 494, WOODWARD, J., speaking of the cases of *Arrison v. Harmstead*, 2 Barr, 191, and *Wallace v. Harmstead*, 3 Har., 462, said: "The stern ruling in those cases was applied without hesitation to a *bona fide* purchaser of the ground-rent without notice of the fraud, so that as far as concerns Arrison and all persons claiming under him the part of the deed which was intended to inure to his benefit, may indeed be

said to be dead. It was not merely a voidable instrument, it was void. It was called a forgery, and treated as such, and neither law nor equity would tolerate it even in the hands of an innocent purchaser."

We are clearly of opinion that the learned court below was in error in the answer to the defendant's second point, and for that reason the judgment must be reversed. The views we have expressed require a modification of the answers given to the defendant's third and seventh points, and the case is also reversed on the seventh and ninth assignments, in which those answers are complained of. As to the other matters presented by the various assignments, we forbear discussing or deciding them, for the reason that the case goes back for another trial and these questions may be affected by testimony to be then delivered.

Judgment reversed and venire facias de novo awarded.

ALLEGHENY VALLEY RAILROAD COMPANY, Defendant Below, v. STEELE.

When a point is submitted, based upon an hypothesis supported by actual testimony in the cause, the party submitting the same has a clear right to definite instruction upon the effect of the alleged facts.

Where the authority of an agent to rescind a contract made by his principal is a disputed fact, the question is for the jury and not for the court to determine.

In an action by a vendor against his vendee to recover damage because of the refusal of the latter to receive the goods sold, the proper measure of damage is the difference between the price agreed to be paid and the cost of the article to the vendor.

Error to the Court of Common Pleas of Venango county.

This was an action brought by B. C. Steele against the Allegheny Valley Railroad Company to recover damages for an alleged breach of contract by the latter in refusing to receive railroad ties which plaintiff had contracted in writing to deliver at an agreed price. The contract was as follows:

"PITTSBURGH, April 8, 1875.

"Memorandum of Agreement between B. C. Steele and Allegheny Valley Railroad Company. Said Steele agrees to deliver in cars at Oil City or at grade on line of said, eight thousand (8,000) or ten thousand cross-ties, before September 1, 1875; said ties to be white oak or chestnut oak, and to be made of young, thrifty timber, hewn on two sides, and cut square at the ends. (No split ties will be received). The ties will average nine inches across the face. (No tie with less than seven inches face measure will be taken). They will measure eight feet six inches (8.6) long and seven inches thick.

"In consideration said railroad company agree to pay fifty (50) cents each for all ties delivered as aforesaid.

"B. C. STEELE.

"Witness:

"J. BLACKSTONE.

"J. J. LAWRENCE,

"(General Superintendent.)"

The plaintiff alleged that the defendant refused to allow him to put in ties under this contract, and claimed as damage such profit as he could have made, if allowed to carry out his contract. The defendant denied having refused to take ties under the contract, but alleged that the ties offered for delivery utterly failed to meet the terms of the contract.

The plaintiff received from S. H. Jackson, resident engineer of the defendant company, the following telegram and letter:

"PITTSBURGH, 19.

"B. C. Steele, Titusville:

"No more ties from you will be received from O. C. & A. R. here. Letter by express to-night.

"S. H. JACKSON."

"PITTSBURGH, June 19, 1875.

"B. C. Steele:

"Dear Sir:—As your contract for ties has not been approved you had best stop furnishing. Any hemlock ties we may receive from you will be held subject to your order.

"Yours truly,

"S. H. JACKSON,
"Res. Eng."

These he seems to have treated as a rescission of the contract above quoted. The questions raised by the fourth, fifth, sixth and seventh assignments of error embraced the principal points involved in the controversy.

4. The court erred in answering the defendant's second point, which was as follows: "The words and acts of the parties are to be construed in connection with the circumstances attending the transaction, and if the jury believe plaintiff had been delivering and attempting to deliver, under the contract, railroad ties inferior to and of a different kind from those specified in the contract, and that defendant, in refusing to take ties from the plaintiff, had reference to such inferior ties, the plaintiff cannot recover, even if the words used by the defendant's agent might have a broader construction." Which point the court answered as follows: "This point is evidently framed to meet the telegram and letter from S. H. Jackson, the resident engineer of the defendant, on or about the 19th of June, 1875, notifying him in substance not to deliver any more ties, as the contract had not been approved. There is no evidence tending in the slightest degree to show that the contract itself was subject to the approval of the board of directors of the defendant company, or any other officer or officers. If, therefore, you find from the evidence that they clothed their resident engineer, Jackson, with authority to inspect the ties and to accept or reject them, and if he, by telegram or letter, or by both, notified the plaintiff that he had best not furnish any more ties, as the contract had not been ap-

proved, he was legally justified in treating such notice as the notice of the company. Thus explained, this point is refused."

5. The court erred in answering the defendant's third point, which was as follows: "The court is asked to charge the jury that any act of S. H. Jackson, whereby he should attempt to revoke or rescind a contract made by the superintendent, would not bind the defendant unless such act were done by authority of, or afterwards ratified by the superintendent or other superior officer." Which point the court answered as follows: "As explained in our answer to the second, the last point read, this point is also refused."

6. The court erred in answering the plaintiff's first point, which was as follows: "Under the contract between the defendant Railroad Company and B. C. Steele, the plaintiff had the right to put in the ties described therein at any time before September 1, 1875, and if before the expiration of such time the defendant notified the plaintiff that they would not receive the ties under said contract, and refused to do so, such notice and refusal was a breach of the contract on the part of the defendant." Which point the court answered as follows: "This point is answered in the affirmative, and further, we say that if the telegram and letter were sent by Jackson, that would amount to a breach of the contract if you believe it."

7. The court erred in answering plaintiff's second point, which was as follows: "If the jury find from the evidence that plaintiff was able and willing to deliver the number of ties mentioned in the contract in accordance with the terms, and was hindered and prevented from so doing by the defendant, the plaintiff is entitled to recover in this action for the loss of whatever profit proved, which he would have received, or which would have accrued to him had he been permitted to carry out the said contract on his part." Which point was answered as follows: "Affirmed."

For plaintiff in error, defendant below, *Messrs. Hancock & Glenn.*

Contra, Messrs. Osmer, Dale & Freeman.

Opinion by GREEN, J. Filed November 7, 1881.

This action was brought to recover damages, by one who had contracted in writing to deliver railroad ties, against the company who had agreed to take them, for refusing to take ties tendered for delivery. The company defended on the ground that the ties offered for delivery did not correspond with the requirements specified in the contract. Considerable testimony

was given in support of this defense. Some of the ties had been received and paid for—others had been refused. The defendant by their second point asked the court to instruct the jury that if they believed the plaintiff had been delivering and attempting to deliver inferior ties of a different kind from those specified in the contract and that the defendant in refusing to take ties from the plaintiff, had reference to such inferior ties, the plaintiff could not recover on account of such refusal even if the words of refusal might have a broader construction. This point ought to have been affirmed. It was based upon a hypothesis which was supported by actual testimony in the cause and the defendant had a clear right to a definite instruction upon the effect of these facts. But the learned judge of the court below refused the point. In doing so he added an explanation about another matter foreign to the essential proposition of the point and overlooking its effect. Neither the telegram nor the letter sent by Jackson to the plaintiff certainly and absolutely related to this particular contract. Whether they did or not was a disputed fact in the case. And if they did and were sent because of the inferior character of the ties the defendant would or might be authorized to terminate the contract in this or any other mode. Yet the whole effect of the inferior character of the ties as bearing upon the right of the defendant to terminate the contract on that account, was taken from the jury by the answer to this point. Nor is this defect compensated by proper instructions on the subject in any other portion of the charge. Other matters are spoken of quite foreign to the case, but as to this vital subject nothing further was said.

In their third point the defendant called in question the validity of an act of rescission by a subordinate officer, of a contract made by his superior officer, without any authority to rescind. The proposition of the point was legally sound and should have been affirmed without qualification. Yet it was refused with a reference to the explanation made in answer to the second point. That explanation furnishes no proper response to the point, and here also there was error.

The answer to the plaintiff's first point was still more erroneous. The point itself utterly ignored the entire defense set up as a justification of the rescission of the contract by the defendant, and asked for a binding instruction upon the mere fact of refusal without reference to any other facts in the case. The refusal to take ties under the contract would have been a

breach of the contract by the defendant if it was unauthorized by any act of the plaintiff. But if by his own conduct he had released the defendant from their obligation to take his ties, then their refusal to take them was no breach. With an explanation of this kind the point could have been affirmed. But it was affirmed absolutely, and then the learned judge went still further, much beyond anything contained in the point, and told the jury that if the telegram and letter were sent by Jackson, that would amount to a breach of the contract. In this there was clear and grave error. It was the assumption by the court of the whole power of the jury over this part of the case. Jackson's authority to rescind was a disputed fact in the case. Without commenting upon the question whether the plaintiff had given evidence to prove such authority, it is enough to say that the defendant gave direct and positive testimony that he had no such power. More than that it was a disputed matter whether the letter and telegram referred to ties under this particular contract. The plaintiff was at the same time delivering *hemlock* ties to the defendant under another agreement. He testified himself: "While this contract was in existence I had another contract from Mr. Jackson for hemlock ties that was in existence." As the letter contains a reference to hemlock ties, and the telegram mentions no particular kind, and no particular contract, it was a question of *fact* in the case whether the letter and telegram did relate to the contract declared upon in this suit. This question it was the special province of the jury to decide. Still, more than this, the letter was not an absolute refusal to take ties, nor was it an order not to deliver any more. The language is: "You had best stop furnishing." This was scarcely more than advice and was certainly not a peremptory refusal. If followed up by such a refusal in fact it might have been regarded as testimony indicative of such a purpose. But all that would be for the jury. In no circumstances was it proper for the court to decide all these matters by a binding instruction to the jury.

As this was an action by the vendor against the vendee for refusing to receive the articles sold, we think the answer to the plaintiff's third point as to the measure of damages was correct. In such circumstances the difference between the price agreed to be paid and the cost of the article to the plaintiff would be the proper measure of his damage.

On the fourth, fifth and sixth assignments the judgment is reversed and a venire facias de novo awarded.

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FORMER JEOPARDY.

Whether one can be tried for murder of the first degree, upon new trial granted under a conviction of murder of the second degree, has been exciting some attention in the Pittsburgh newspapers, and as they seem to be of opinion that it is a novel question, it may be of interest to the profession to have brought before it the legal aspect of the matter.

To suggest that the question is a novel one and to treat it as a great legal discovery is about as absurd as to call the first view of some unlooked for comet, by some belated reporter, a new discovery, when its advent has been forecast for one hundred years.

The question is, in fact, almost too plain for argument. Under the constitution of the several States and of the United States, no one can be put twice in jeopardy of life or limb for the same offense. With the qualification of a necessity, arising from some providential interference, the rule is absolute and imperative. It is a fundamental right which cannot be taken nor given away. Once acquitted by the jury no man can be legally tried again for an offense of which he might have been properly convicted or acquitted under the indictment, no matter how apparent it may be afterwards that he was guilty of the offense comprehended by it.

This cannot be questioned in this State. The apparent difficulty has arisen from the fact that when a new trial was granted in a criminal case it is assumed that it restores the defendant to his original status, as though he never had been tried, but this is a clear *non sequitur*.

We have seen that by constitutional provision no man can be tried again for the same offense after acquittal. The court would have no power to do so, even at the instance of the defendant. Where an indictment is such that several distinct but cognate offenses can be tried under it, so that the jury are bound to examine and determine the guilt or innocence of the defendant in regard to each particular offense, it is evident the conviction of one is an acquittal of the others. This is more especially apparent when under an indictment such as is usual in Pennsylvania in charges of murder, there is but one

count, and the jury are specially directed to inquire whether the prisoner is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter, and to return in their verdict of what degree of criminal homicide he is guilty. Were the verdict in such a case put in technical form it would be: "We find defendant not guilty of murder of the first degree but we find him guilty of murder of the second degree."

The foregoing covers the technical aspect of the case. We cite several authorities supporting these views:

Wharton, in his *Criminal Pleading and Practice*, at Section 895, states the rule as follows: "When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offenses, a new trial can only be granted on the count on which there has been a conviction, and it is error, on a second trial, to put the defendant on trial for the former." Citing eight authorities.

In Section 896, the same author says: "Where two offenses are included in one count, there has been a distinction taken, which, though specious, is unsound. It has been held, that where one count includes burglary and larceny, after acquittal of the greater offense, but conviction of the less, and when a new trial is obtained, the whole case is reopened and the defendant exposed on the second trial to the double charge. But the true view is that a conviction of the *minor* offense is to operate as an acquittal of the *major*." Citing several authorities.

Bishop on *Criminal Law* (5th Edition, 1872), Vol. I, § 1056, says: "When a man is indicted and tried for murder, but the jury find him guilty only of manslaughter, he is thereby protected from any further prosecution for the murder."

In *Weinzorpfen v. The State*, 7 Blackf. (Ind.), 186 (1844), the Supreme Court say that "a verdict finding the defendant guilty in one of several counts of an indictment, and saying nothing of the other counts, is, as to such counts, *equivalent to an express finding of not guilty*."

Another Indiana case, decided in 1873 (*Clem v. State*, 40 Ind., 420) holds as follows: "If upon an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying anything as to the higher grade, the finding is by implication an acquittal of the higher grade."

In *Hurt v. The State*, 25 Miss., 378 (1853), the court say: "The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence could be."

The Supreme Court of Illinois, in *Brennan v. People*, 15 Ill., 511, decided in 1854, say: "A person indicted for murder may be found guilty of manslaughter, and such finding amounts to an acquittal of the charge of murder, and the accused cannot again be put on trial for murder. If the accused seeks and obtains a new trial he will only be tried for the offense of which he was found guilty."

In the case of *People v. Gilmore*, 4 California, 376 (1854), the defendant was convicted of manslaughter upon an indictment charging the crime of murder. The verdict was, *on his motion*, set aside. *Held*, that on the second trial he could plead the former conviction of manslaughter as an acquittal of the crime of murder. Also, that under the same indictment he could be again tried and convicted of manslaughter.

The Supreme Court of Texas, in the case of *Cheek v. The State*, decided in 1878 (7 The Reporter, 63), say: "Where a party is charged with murder and is found guilty of murder in the second degree, he is thereby acquitted of murder in the first degree."

Supreme Court, Penn'a.

SCHOOL DISTRICT OF THE CITY OF ERIE v. F. C. J. FUESS, by His next Friend, J. FUESS.

Where the purpose of a contract is lawful, and the owner of property may lawfully commit its improvement to others, if he employs a contractor to do the work and the latter is guilty of negligence in doing it, whereby third parties are injured, the contractor and not the employer is liable.

A person is not liable for the acts of another unless the relation of master and servant, or principal and agent exists between them.

School districts are territorial divisions for the purposes of the common school laws, and their officers have no powers except by express statutory grant and necessary implication; and these are for the establishment and maintenance of the public schools.

The presence of some of the directors of a school district and of a superintendent hired by the board during the progress of repairs commenced by a contractor before the time fixed in his contract, will not make the district liable for injuries to a scholar caused by the negligence of the contractor.

Error to the Court of Common Pleas of Erie county.

The school board of the City of Erie decided to repair and enlarge school building, No. 7, situated near the corner of 21st and Sassafras streets, in Erie. On the 13th day of May, 1875, the building committee prepared an agreement with John Hendry, a builder of large experience, according to which he was to do the work and

furnish necessary material for the sum of \$7,460. The work was not to be commenced until the close of the term, July 3, 1875. An agreement was also made with Henry Sherk, by which he agreed "to devote all the time to said work necessary to a careful and complete superintendence of same." Both of these agreements were drawn, subject to the approval of the school board, and on the 15th day of May, 1875, the directors met, and the two contracts referred to were submitted to them; and by resolution duly passed, they were formally approved. Meetings of the school board were held on the 3d and the 11th days of June thereafter, but no further action of any kind was taken concerning the giving possession of the building to the contractor so that he might begin work earlier than July 3d, the day named in said contract.

Without the consent the board, Hendry, probably on the 21st or 22d day of June, began excavating in the cellar of the school house by scraping the gravel from between the piers supporting the floor above. In the afternoon of the 22d Mr. Sherk directed those engaged to desist, and they agreed to do so; but they continued working after he left, and in the forenoon of the 23d of June, one of the piers was undermined and fell, thereby causing the floor beams to settle so that an iron column resting on it and supporting the second floor fell, and in falling struck one of the scholars, Frederick C. J. Fuess, and seriously injured him. This suit was brought to recover damages for the injury thus caused, and the jury awarded him \$1,291.66.

There was evidence that the Superintendent of the Public Schools of Erie and many of the board of directors saw the work as it progressed and made no objection either to the work or to the contractor having commenced it before the time fixed in his contract.

The third and fourth assignments of error (which are sustained) are:

Third. Charging the jury as follows: "No member of the school board had the power to change the terms of the written contract, but if the contractor, with the knowledge and assent of the superintendent appointed by the board, began the work before the time fixed in the agreement, and was permitted by him to carry on the work with the presence and knowledge of some of the members of the board, and the jury believe from the evidence that the plan and design of the work was in itself such as involved danger to the building, then the liability for injury resulting is not upon the contractor exclusively, but upon the School District."

Fourth. Refusing to charge as requested in defendant's fourth point, which was: "The time

for beginning the repairs was a part of the contract with Hendry, and no authority from the defendant having been proven to change the time, and Shenk, the superintendent, having no authority to make any such change, the evidence that Shenk told him to begin work is not sufficient to relieve Hendry, or to charge and hold defendant answerable in this case."

For plaintiff in error, defendant below, *S. A. Davenport, Esq.*

Contra, Messrs. Benson & Brainerd.

Opinion by TRUNKY, J. Filed November 14, 1881.

John Hendry contracted with the School District to furnish all the materials and perform all the work for the extraordinary repairs upon school building, No. 7, in strict compliance with the plans and specifications prepared by Henry Shenk, under the superintendence of said Shenk, or such other person as the district might designate. He undertook to do the work with reference to plans and specifications already prepared, and agreed that he should not be entitled to pay for extra work or material, unless the same should be done or furnished on the written direction of the district indorsed on the contract. Possession was to be delivered to him for commencement of the work, on July 3, 1875, at which time the house would be unoccupied. It was contemplated that possession would be given at an earlier date, if the building should be previously vacated, but the district neither delivered possession nor agreed that the work should be commenced before the time named in the contract.

By agreement of same date, the district employed Shenk to superintend the work to be done by Hendry, and devote all the time necessary to a careful and complete superintendence of the same. His business was to see that Hendry faithfully performed his agreement as the work progressed. He was not authorized to change or modify the contract in any particular. Nothing was committed to him other than to superintend the work which was to be done; he had made the plans and specifications which constituted a part of Hendry's contract; and the allegation that "Shenk was made the agent and superintendent of the school board, with full power to make the plans and specifications, and to begin and control the execution of the work for the board in all its details," is gratuitous.

The plan of the work was such as involved danger to the building. Hendry commenced before he was authorized, and the result proved the prudence of the school board in fixing the

date for commencement after the vacation of the schools. The testimony shows that the injury to the plaintiff was caused by gross, if not culpable negligence. Shenk was superintending the work and some of the members of the board knew the work was being done, before the accident.

In the instructions to the jury the court said: "If the contractor, with the knowledge and assent of the superintendent appointed by the board, began the work before the time fixed in the agreement, and was permitted by him to carry on the work with the presence and knowledge of some of the members of the board, and the jury believe from the evidence that the plan and design of the work was in itself such as involved danger to the building, then the liability for injury resulting is not upon the contractor exclusively, but upon the School District." That, we think, was error.

Where the purpose of the contract is lawful and the owner of the property may lawfully commit its improvement to others, if the owner employs a contractor to do the work and the latter is guilty of negligence in doing it, the contractor and not the employer is liable. A person is not liable for the acts of another, unless the relation of master and servant or principal and agent exist between them. When an injury is done by a party exercising an independent employment, the party employing him is not responsible to the person injured. This principle applies to municipal corporations: *Painter v. The City of Pittsburgh*, 10 W. R., 213. If the contractor is to perform according to the plans and under the direction of an architect he is nowise relieved from his positive covenants to do the work; he continues to have control over the men he employs and of the mode of performing his contract, and is liable for injuries caused by his neglect: *Allen v. Willard*, 7 P. F. S., 374. In a contract with a city for the constructions of a sewer, it was stipulated that the work should be commenced and carried on at such times and in such places and in such a manner as the engineer of the city should direct; and that was not such a reservation of power as made the city liable for an injury occasioned by the negligence of the contractor: *City of Erie v. Caulkins*, 4 Nor., 247. A contractor for the grading and paving of a street in a city, the work to be done "under the directions and to the satisfaction of the city engineer and the committee on streets," is responsible for an injury he does to property abutting on the street, and the city is not liable: *Reed v. Allegheny City*, 29 P. F. S., 300.

If the School District is to be treated as strictly a municipal corporation, the authorities settle

that the employment of Shenk did not operate as a relief to the contractor, nor did it make the district liable as a master or principal for Hendry's trespass or carelessness. But school districts are corporations of lower grade and less power than a city, have less the characteristics of private corporations and more of a mere agent of the State. They are territorial divisions for the purposes of the common school laws, and their officers have no powers except by express statutory grant and necessary implication; and these are for the establishment and maintenance of the public schools. The common school system partakes much of the nature of a public charity, extends over the whole State, is sustained by the public moneys, and the directors, who devote much time and labor for the public benefit, receive no compensation for their services. Unless exempted by the act of incorporation or by-law, a private corporation is liable for the wrongful acts and neglects of its officers done in the course and within the scope of their employment, the same as a natural person is for the acts and neglects of his servant or agent. A less stringent rule applies to public corporations, and least stringent of all should be applied to school districts, whose officers have limited and defined powers in a system exclusively for the free education of the children in the Commonwealth.

The directors as a board must exercise their powers—the board may make contracts, may authorize a committee to make a contract, and may appoint an agent for a proper and specific purpose. One or more of the directors, without authority from the board, can make no contract binding upon the district, cannot change a contract, can do no act fixing the district for a liability. He may be personally responsible to those who suffer from his unauthorized acts, as any other citizen would be.

If some of the directors were present and knew that Hendry commenced the work before the time named in the agreement, whether they assented or objected, the district was not bound. They could not give him the right to begin at that time. If he began with the knowledge and assent of Shenk, the superintendent appointed by the board, he knew or ought to have known that Shenk had no power to assent for the district. Hendry's contract and Shenk's contract with the board contained no such authority. Shenk's sole employment was to superintend the work. In absence of a contract and without authority from the board, had those directors, who knew what Hendry was doing, made the excavation themselves, they would have been individually liable for an in-

jury resulting to any person by reason of their negligence—the district would not have been bound to answer for the consequences of their trespass.

The school board stipulated that possession of the building would be delivered at a date after the vacation of the schools. Before the schools had been closed some of the directors discovered that persons were making a dangerous excavation, and it would have been humane in them to have endeavored to stop it. The board might have been convened, and, if necessary, the schools suspended until the progress of the work could have been enjoined by legal process. But the directors omitted such action, and it is claimed that the district is liable in damages for the injury done to the plaintiff by the act of a trespasser, or the unauthorized act of a contractor. Although the board of directors took no measures to prevent the excavation, we are of opinion that the persons who caused the injury are liable, and not the School District.

The third and fourth assignments of error are sustained. *Judgment reversed.*

JAMES BORLIN et al., Defendants Below, v. THE COMMONWEALTH ex rel. WILLIAM HILLIS.

Statutes and rules of court authorizing the entry of judgment for want of a sufficient affidavit of defense, do not include actions in *tort*, upon contracts which are for uncertain sums, or upon a recognizance, or judgment, or bond, or mortgage or any other instrument given to secure collateral conditions.

Error to the Court of Common Pleas of Westmoreland county.

James Borlin, sheriff of Westmoreland county, on the 14th of December, 1877, with William Brisbine and others, the plaintiffs in error, entered into a recognizance in the sum of \$25,000, conditioned for the payment to the several suitors and parties interested in the execution of such writs and process of all moneys which should come to his hands, and also for the faithful performance of his duty as sheriff, as set forth in said recognizance.

On the 13th of December, 1880, William Hillis issued a *scire facias* to No. 148, February Term, 1881, returnable to first Monday of January, 1881, upon the said recognizance, and assigned as breach thereof the non-payment of certain money, owing by the said James Borlin, as sheriff, to C. P. Ruff for the use of said Hillis, on certain judgments in said court to Nos. 176, 184 and 185, May Term, 1874, amounting to the sum of \$1,903.11, with interest from 13th No-

vember, 1880, arising from the sale of the real estate of Michael Ruff.

The writ was duly served on the defendants, and an appearance entered for them. On the 22d of January, 1881, the plaintiffs' attorney filed a *præcipe* in the prothonotary's office, directing the prothonotary to enter judgment in favor of the plaintiff against the defendants for the sum of \$1,924.99, with interest. The judgment was entered by the prothonotary, in obedience to the directions of the *præcipe*, by default for want of an affidavit of defense, and an execution issued.

On the same day a motion was made to the court for a rule to strike off the judgment, and after argument on the 24th January, 1881, the motion was denied, and the court refused to strike off the judgment, as shown by the opinion of Judge HUNTER, filed. Writs of error were sued out by the defendants below, the sureties of sheriff Borlin, as also by John M. Peoples and Daniel Reames, who are his assignees under a deed of voluntary assignment.

The error complained of is the entry of judgment on the *scire facias* on the recognizance of the sheriff for want of an affidavit of defense under a rule of the Court of Common Pleas of Westmoreland county, as also the refusal of the court below to strike off the judgment on application of the sureties.

The following is the rule of court referred to:

RULE No. 10. In actions on recognizances, judgments, mortgages, liens of mechanics and material men, municipal claims, transcripts from the Orphans' Court, policies of insurance, book accounts, bonds, bills, notes, and other instruments of writing for the payment of money, either express or implied, and whether the same be in writing or not, and in appeals from the judgments of justices of the peace, if the plaintiff shall file on or before the return day of the writ, with his declaration or statement, or in cases of appeal on or before the first day of the term to which the appeal is entered, an affidavit stating the amount he verily believes to be due from the defendant, together with a copy of the book entries or instrument upon which the suit is brought, or where the claim is not evidenced by writing, a brief, setting forth a full and detailed statement of the same, verified as aforesaid, he shall be entitled to judgment at any time on or after the third Saturday succeeding the return day of the writ in original cases, or in appeals succeeding the first day of the term to which the appeal is entered, unless the defendant shall have previously filed an affidavit of defense, setting forth the nature and character of the same; *Provided*, That neither declaration, affidavits by plaintiff, nor copy of instrument, need be filed where the action is on a mortgage, mechanic's lien, recognizance, or other record of the several courts of this county, but in such case it shall be sufficient if the plaintiff files with his *præcipe* or otherwise before the return day a proper reference to the record or place of the entry of such mortgage, mechanic's lien, recognizance, or other record.

For plaintiffs in error, defendants below, *Messrs. Turney & Kline and Kuhns.*

Contra, Messrs. Johnston & Moorhead.

Opinion by TRUNKEY, J. Filed November 14, 1881.

James Borlin, with his sureties, entered into recognizance, in the form prescribed by statute, to be given by the sheriff before he enters upon the duties of his office. Among the conditions is, that he shall well and faithfully execute and perform all and singular the trusts and duties to the said office lawfully appertaining. Another is, that he shall from time to time, upon request, pay to the proper parties all sums of money to them respectively belonging, which shall come to his hands in the execution of writs and process to him directed. This suit is upon the recognizance, and judgment was entered in default of an affidavit of defense. It is assigned for error that the judgment was not authorized by the rules of court.

The rule applies to actions on recognizances, judgments, mortgages, bonds and other instruments of writing for the payment of money. It is similar to rules in other districts and to numerous local statutes authorizing judgments for like default. But these statutes and rules, though not equally extensive in their application, have always been limited to obligations and contracts for the payment of money. They do not include actions in *tort*, nor an action upon a contract which is for an uncertain sum. The contract to pay may be implied, as where a man sells and delivers goods without an express agreement as to the price, in action against the buyer the seller may aver the value, for it can be made certain.

It was said by the learned judge of the Common Pleas that the rule is very extensive and covers this case. If all recognizances are covered by it, so are all bonds and judgments. Some of each of these may be for the payment of money, and others a security for a collateral matter. One class is within the rule and the other without. If A. and B. give their bond to C., conditioned for the performance of a contract by B. to build a house for C., and B. fails to perform his contract, C. may recover his damages on the bond; but he cannot take judgment in default of an affidavit of defense. There is no standard by which to liquidate such judgment. Whatever the kind of obligation, if it be conditioned for the performance of the duty of a public officer, or of a trustee, or of an agent, or clerk, or to secure the delivery of goods, or the rendering of services, it is not within the statutes or rules of court: *Dauphin & S. Coal Co., v. Dasher*, 1 Pear., 148; *Strock v. Commonwealth*, 8 Nor., 272.

In *Commonwealth v. Hoffman*, 24 P. F. S., 105, it was held in the court below that a sheriff's

recognizance by its very terms is for the performance of a collateral condition, and not within the rules of court, which was affirmed, with the remark that the recognizance was not a record for the payment of money, but for the performance of collateral conditions. There the rule included records. A sheriff's recognizance is a record, and the record was treated precisely as a recognizance, or judgment, or bond, or mortgage would have been, if conditioned for the security of some collateral matter.

In all the rules and statutes, the several obligations therein named, heretofore, have been construed to mean only such as were for the payment of money, and, we think, the rule in Westmoreland should receive like construction. The language is similar to that used in prior statutes and rules, which had been judicially interpreted, and, therefore, is presumed to have been employed in the same sense. As the rule does not apply to an action on a sheriff's recognizance, or upon any other instrument to secure collateral conditions, it is unnecessary to decide whether the courts have power to make rules which would include such instruments. If they have and should exercise it, as remarked by the late Justice WOODWARD, in *Sands v. Fritz*, 3 Nor., 15, the practice of requiring affidavits of defense in such cases would seem capable of producing mischief and injustice.

Judgment reversed and procedendo awarded.

WILSON McCANDLESS, Jr., Executor, et al.
v. WILLIAM H. MACKEY et ux.

Owely in partition constitutes a first lien on the purpart of the former tenant in common, and is entitled to priority over a mortgage of his undivided interest given by said tenant before the partition.

Where one of several tenants in common accepts a purpart charged with owely, having first mortgaged his undivided interest in the whole estate, the lien of such mortgage follows the purpart allotted to the mortgagor, and is postponed, to the lien of the owely and costs of partition.

A mortgagee or other lien creditor of a tenant in common, holds his security subject to the rights of the other tenant in common to demand partition and subject to all its incidents, and this without the right to notice of the partition proceedings.

Appeal of Wilson McCandless et al., Executors of Robert W. Mackey, deceased, from a decree of the Court of Common Pleas, No. 1, of Allegheny county, dismissing their exceptions to the report of an auditor distributing the proceeds of a sheriff's sale, and confirming the report.

The facts were as follows: Ann Eliza Mackey, being tenant in common with her brothers and sisters of a large tract of land, executed a

mortgage, her husband joining, of her undivided interest therein to Robert W. Mackey, the appellants' testator, for \$2,000. Subsequently in proceedings in equity in partition the land was divided into seven purparts of unequal value.

Mrs. Mackey's interest as appraised, was \$5,923.05. Purpart No. 6, valued at \$9,480, was allotted to her, charged with owely of partition for the excess, \$3,556.95.

Subsequently, Robert W. Mackey (who had no notice of the partition) issued a *scire facias* on his mortgage, and Mrs. Mackey's purpart was sold at sheriff's sale for \$1,600. The auditor, to whom the proceeds were referred for distribution, awarded the fund to the parties entitled to the owely of partition *pro rata* according to their several owelities. Robert W. Mackey's executors, claiming that they were entitled to have their mortgage paid out of the fund as a first lien, filed exceptions to the report, which were dismissed by the court and the report confirmed. They thereupon took this appeal, assigning for error the action of the court.

For appellants, *Geo. W. Guthrie, Esq.*

Contra, Messrs. Slagle & Wiley, Barton & Sons and Whitesell & Son.

Opinion by MERCUR, J. Filed October 31, 1881.

Neither a judgment nor a mortgage lien against one tenant in common, prevents a partition, either at his instance or at that of another of the tenants: *Bovington v. Clarke*, 2 P. & W., 115. The mortgagee of an interest in an undivided estate, is not entitled to be made a party to a proceeding in partition: *Long's Appeal*, 27 P. F. Smith, 151. He has an incumbrance only on the land; but no estate in it. He has no right whereby he can elect to take or to refuse a purpart, nor can he give security for owely: *Id.* The primary object of partition is to divide the land among the tenants according to their respective shares therein. If such a partition is not practicable without prejudice to the whole, then only should it be portioned into purparts of unequal value. In case of a lien on the interest of a co-tenant to whom a purpart is allotted in severalty, the lien follows the separation and attaches only to the estate so taken; but is discharged as to the other purparts: *Jackson v. Pierce*, 10 Johns., 414; *Bovington v. Clarke*, *supra*; *Long's Appeal*, *supra*; *Wright v. Vickers*, Adm'r, 31 P. F. Smith, 122.

The rights of tenants in common to make partition and to enjoy all the incidents connected therewith, are paramount to the rights of a lien

creditor against any one of the tenants. If necessary to effect the legitimate purpose of partition, such a lien must yield some of its former binding force, and may even be wholly divested. Hence, notwithstanding, the Act of 23d March, 1867, declares that the lien of a first mortgage shall not be destroyed or in any way affected "by any judicial or other sale whatsoever," yet, where, after the commencement of proceedings in partition, one of the co-tenants executed a first mortgage on his undivided interest, and the proceedings in partition resulted in a sale by the sheriff, it was held that the lien of the mortgage was thereby divested: *Wright v. Vickers, Adm'r, supra*. The case was not ruled on the ground that the mortgage was executed during the pendency of the proceedings in partition; but on the broader ground of the paramount rights of tenants in common to make partition and to enjoy all the incidents flowing therefrom.

The 38th section of the Act of 29th March, 1882, Pur. Dig., 436, pl. 150, provides in case equal partition in value cannot be made, and the court orders the purparts to those entitled thereto, it shall award them "subject to the payment of such sum or sums of money as shall be necessary to equalize the value of said purparts according to the said appraisement thereof." The purpart of which the proceeds are now in contention was so allotted "subject to the payment as owelty in partition" of sums sufficient to equalize the valuation. The lien of the recognizance then attached to the whole estate thus taken: *Long v. Long*, 1 Watts, 265; *Cabbage v. Nesmith*, 3 Id., 314.

Liens for owelty of partition in the Orphans' Court in several respects, stand on a different footing from liens of judgments in the Common Pleas. The former are in the line of title, and must be looked for in the proceedings of partition; liens in the latter court are outside of the line of title. A judgment docket is required to be kept in the Common Pleas for the information of subsequent lien creditors and purchasers. None is required in the Orphans' Court. To ascertain in regard to a lien there, the proceedings in partition must be examined: *Riddle & Pennock's Appeal*, 1 Wright, 177.

A purpart taken in severalty is allotted as an entirety. Whether the tenant's previous interest in the whole was large or small it matters not when he takes a purpart charged with owelty. He takes it as a whole. The recognizance to secure the payment thereof attaches to the whole. Why shall it not become the first lien thereon. A co-tenant, for whose benefit the recognizance is taken, may be divested of his

whole estate in all the land partitioned. His only security for payment is the recognizance. There is no line of separation or division running through a purpart by which it can be divided to apportion liens.

Presumably, the tenant thus taking acquires an estate in land of a value as much greater than his previous estate, as the amount of the owelty is charged thereon. Hence, although a previous lien on an undivided interest, may in form, be displaced by the lien of the owelty in partition, yet the effect is more imaginary than real. It will practically bind land of a value equal to that on which it was a lien before partition. The partition has added to the value of the estate of the tenant, a sum equal to the amount of the owelty charged thereon.

Conceding, however, that a second lien is not as desirable as a first one, yet when a person obtains a lien against the estate of a tenant in common, he assumes that risk. He knows the estate is subject to partition and all its incidents. He cannot impair any of the rights of the co-tenants. Their rights are superior to the rights of a lien creditor of one tenant. Such a lien will not deprive them of any right incident to a partition that they might otherwise have enjoyed.

The case of *Randell v. Mallett*, 14 Maine, is not applicable to the present case. That was not a partition subject to owelty charged on a purpart. The lien there in contention was not in the line of the title, but merely an incumbrance on the land. It was therefore correctly held that it was not in the power of the mortgagor by a sale of part of the land and subsequent partition to extinguish the lien on the parts sold, without the consent of the mortgagees. We have thus considered the only question urged on the argument and discover no error in the record.

Decree affirmed and appeal dismissed at the costs of the appellant.

◆◆◆
REINEMAN, Defendant Below, v. MOON.

No man can be deprived of his property by a forged deed or mortgage, and against such a defense the magistrate's certificate of acknowledgment is not conclusive, no matter what may be the *bona fides* of the holder.

The assignee of a forged instrument has his remedy against the assignor, who always impliedly warrants the genuineness of it.

It is proper to qualify a point too broad in its terms.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was a *scire facias* upon a mortgage duly acknowledged before a magistrate, who had died

before the trial. The plaintiff bought the mortgage *bona fide*, without notice of any defense and without anything to put him upon inquiry. The defense was that the mortgage was a forgery.

The court refused plaintiff's point, to wit: "Plaintiff appearing to be a *bona fide* holder for value, without notice of any fraud, the magistrate's certificate of acknowledgment is conclusive, and the verdict should be for the plaintiff."

The court qualified the following point of plaintiff, to wit: "The magistrate's certificate of acknowledgment is entitled to more weight with the jury than the testimony of an ordinary witness, to wit: to the weight due to the testimony of such specially appointed witness that the mortgagor had personally and solemnly acknowledged the paper as his act and deed in his, the witness's presence, by replying as follows: In a certain sense the certificate of acknowledgment is entitled to more weight than the testimony of an ordinary witness because it is the act of an officer, constituted by law for that purpose, and the presumptions are in favor of the honest and faithful discharge of his duty, and the presumptions are further that the contents of his acknowledgment are true, therefore his certificate in that sense is entitled to more weight than the testimony of an ordinary witness."

For plaintiff in error, defendant below, *Messrs. Robb & McClung*.

Contra, Messrs. Robb & Fitzsimmons.

PER CURIAM. Filed November 21, 1881.

No man can be deprived of his property by a forged deed or mortgage, no matter what may be the *bona fides* of the party who claims under it. The answers of the court below to both the points put were entirely right. The assignee of a forged instrument has his remedy against the assignor, who always impliedly warrants the genuineness of it.

Judgment affirmed.

WATTERSON'S APPEAL.

Evidence must substantiate the allegation that a wife has elected to take under her husband's will. A refusal by a widow to take under her deceased husband's will, by operation of law, vests in her an interest in his estate under the intestate law without regard to the fact that she was ignorant that such would be the effect of her refusal.

[See facts of this case in *Maloney's Estate*, 27 PITTSBURGH LEGAL JOURNAL, 193].

Appeal from the Orphans' Court of Allegheny county.

Opinion by GORDON, J. Filed November 8, 1880.

Though a widow's statutory interest in the lands of her deceased husband, under the Act of 1833, comes not within the definition of common law dower, it is, nevertheless, an estate of freehold: *Schall's Appeal*, 4 Whar., 170; *Gourley v. Kinley*, 16 P. F. S., 270; *Bachman v. Crisman*, 11 Har., 162. Moreover, this interest, vesting, as it does, in her at the instant of her husband's death, can only be divested by her own act, as by accepting under her husband's will, or by her deed or writing, as prescribed by the statute of frauds and perjuries. Mrs. Bridget Maloney, immediately on the death of William Maloney, her husband, had vested in her an estate for life, in the one-third of the realty of which he died seized, which in due course of law passed to the assignee in bankruptcy of the firm of Mullin & Maloney, of which firm she was a member, unless previously to the bankruptcy of that company, she had by some means, been divested of that estate. But this effect could not be produced by her oral declarations to Mr. Fetterman and others, that she had no interest in her husband's estate, and that she desired the whole of it to go to her children. The statute of frauds and perjuries rendered such declarations of no account, whatever. Unless, therefore, her estate was barred by her acceptance under the will of her husband, that estate remains intact and has passed to her assignee.

Now, it is hardly worth our while to examine authorities as to the effect of the acceptance by a widow of a testamentary provision in her favor upon her dower, for all that is definitely settled by our Act of Assembly. If Mrs. Maloney did accept under the will of William Maloney, whether in writing or parol, or whether that will gave her little or much, the appellant has made out his case, and he must have a reversal of the decree of the court below. Thus the case turns upon a question of fact, and about the law bearing upon it, there is, or ought to be, no controversy.

Let us then consider the provisions of the will, and her action upon them. The eighth item provides as follows: "Whereas, I have a policy on my life in the Aetna Life Insurance Company of Hartford, Conn., No. 47,986, for the sum of ten thousand dollars, for the benefit of my wife, Bridget Maloney; and whereas, it is my desire that the same should be considered as part of my estate, and follow the directions hereinafter in item ninth, provided for my residuary estate, I hereby direct my executors, with the consent of my wife, to invest the amount of said life insurance, when collected,

in good productive real estate for the benefit of my family, the same to follow the disposition hereinafter provided in item ninth for my residuary estate. But in the event of my wife refusing to consent to said investment and disposition thereof, and requiring the whole insurance money to be set apart for her sole and separate use and benefit, then and in such case, I hereby will and direct that she take under this will nothing but the said sum of ten thousand dollars insurance money, and that all the devises and bequests to her under this will be null and void, and of no effect."

It will be observed, that whether the policy above mentioned, and which belonged to Mrs. Maloney, should become the subject of the devise or not depended upon her assent. If she refused to agree to his wishes, the policy dropped out of the will, since of himself, he had no power to make it the subject of devise.

She did refuse to have her own property thus disposed of, and, by this refusal, she was as effectually put out of the will as though she had never been mentioned in it, or as though she had formally refused to accept under it. What then did she take by virtue of the will? For, in order to bar her dower she must have received something by force of that instrument. "I hereby direct," says the testator, "that she take under this will nothing but the said sum of ten thousand dollars insurance money." This, however, confessedly, she took not by virtue of the will, but by virtue of her own right. He certainly could not give to her what he had not to give. In fact he made no such attempt. He but provided, that should she allow her property to come into his will, she should have the benefit of certain devises, which included that property; but if she would not so agree, she was to be wholly excluded from the provisions of that instrument, and left to her legal rights.

It is then, as we have already said, manifest that she took nothing under the will, by which her dower could be debarred. What she got was her own property, and this she would have had had the will never been written. It is, therefore, idle to say, that, by keeping her own property, she elected herself out of her dower. The doctrine of election would have applied had she chosen to take under the will; for, by that act, she would have at once surrendered her right both to the life policy and to dower, but there could be no such effect when she refused to accept the devise in her favor. It would, indeed, be monstrous if a husband could thus devise a wife out of her dower, and that in spite of her legal right of election. As in the

present case, a husband devises to his wife her own property, and, as to her, it is all loss and no gain; if she accepts, her own dower is gone; but if she refuses to accept, and elects to retain her own property, she also loses her dower. This will not do; a devise of this kind has not even the recommendation of ingenuity; it is a mere fraud on the rights of married women, and a gross perversion of the laws provided for their protection.

Decree affirmed, appeal dismissed and it is ordered that the costs be paid by the appellant.

For appellant, *Messrs. A. M. Brown and A. V. D. Watterson.*

For L. C. Barton, Assignee in Bankruptcy of Bridget Maloney, *Messrs. Barton & Sons, Josiah Cohen and H. H. McCormick.*

Orphans' Court.

In Re ESTATE OF WM. MALONEY, Deceased.

- (1.) John Mullin filed an account as executor of the will of William Maloney, deceased, in 1873, in which he charged himself, *inter alia*, with the following item: "Increase in value of said interest (in the firm of Mullin & Maloney) to last settlement, April, 1872, \$12,023.14." He filed a second account in 1880, in which he credited himself with "amount paid Mrs. B. Maloney, proceeds of insurance policy mentioned in paragraph eight of her husband's will and taken in lieu of all her interest in his estate, \$9,643.32," and now claims that this amount was included in the debt in his first account above quoted.
 - William Maloney bequeathed an interest in his estate to his wife Bridget, on condition that she should agree that the proceeds of the above mentioned policy, which stood in her name, should become part of his estate. She refused to take under the will, received the proceeds of the policy about one month after the date of the debt above quoted, and loaned it to a new firm of Mullin & Maloney, formed by her and John Mullin after the death of William Maloney. *Held*, that accountant was not entitled to the credit claimed.
 - (2.) John Mullin was made trustee to hold and manage the estate and pay the income thereof to Mrs. Maloney, testamentary guardian, for a specified period. Within that period he paid Mrs. Maloney, testamentary guardian, \$6,300 of the corpus of the estate. *Held*, that this payment was illegal.
 - (3.) See *Watterson's Appeal, ante*.
 - (4.) Accountant charged himself with interest on \$7,000 belonging to the firm of Mullin & Maloney. This \$7,000 is not charged specifically on either of the accounts. But accountant charged himself with the appraised value of William Maloney's interest in that firm and an increase in value. *Held*, that accountant was not chargeable with this item.
 - (5.) See *Watterson's Appeal, ante*.
- Opinion by HAWKINS, P. J. Filed October 1, 1881.
- (1.) The theory of accountant that the pro-

ceeds of the policy of life insurance which stood in the name of Mrs. Maloney was included in the item of \$12,023.14 debited as of April 1, 1872, in his first account, is not well founded in law or in fact. The circumstances of the case are such as render it incredible that so palpable a mistake should have been made. This item on its face relates solely to an alleged "increase in value" of decedent's interest in the firm of Mullin & Maloney. The policy on its face stands in the name of Mrs. Maloney individually, and never in fact became the asset of the estate of William Maloney, deceased. Had Mrs. Maloney accepted the terms of the will, neither the policy nor its proceeds could have had any connection whatever with the affairs of the firm. Its face, its value, and the part which it was made to play in the will, gave it a character so distinctive that, if it appeared in the administration at all, it must have been individualized. There was no possible reason or excuse for confusion. That the proceeds of the policy were not included in the item of April 1, 1872, is further shown by the fact that they were not received until nearly a month after that date. The dates given, and the statements therein made, were verified by the oath of accountant, and entitled to the more credence because the facts were fresh and there was no controversy with respect to them. The absolute confirmation of the account set its seal upon them and concluded the parties interested: *Shindel's Appeal*, 57 Pa. St., 43.

If in fact the proceeds of the policy were included in the item of April 1, 1872, the account to that extent was misleading and in fraud of the rights of creditors and legatees. As already stated, the policy was on its face the property of Mrs. Maloney; it never became an asset of the estate of William Maloney, deceased; and had Mrs. Maloney accepted under the will, neither it nor its proceeds could in any sense have been regarded as having any connection whatever with the affairs of Mullin & Maloney. The facts were therefore not such as to put creditors or legatees on inquiry; and it is not pretended that they had actual notice. They were justified therefore in taking the face of the account as representing the actual state of facts; and the absence of contest shows that they were satisfied with the reported value of Wm. Maloney's interest in the firm. It is not fair to assume that they would have been satisfied with \$10,000 less. Eight years having elapsed since the confirmation of the account, it is obvious that creditors and legatees would be placed at a very great disadvantage if compelled to go into the question of the value of that interest now. It

would be unjust in the circumstances to place them in that position in the absence of default on their part.

It will be observed that the accountant does not directly deny that the value of William Maloney's interest in the firm of Mullin & Maloney was as stated in his first account. He has made no final settlement of the firm affairs, and has furnished no data, other than the statements contained in his account, from which that interest can be ascertained.

The conduct of the executor is another element to be taken into consideration, as affecting his credibility. That he has grossly violated his duty in more than one instance is undeniable; and that some discrimination should be made as between a faithful and an unfaithful trustee as respects credibility seems no more than natural and reasonable. He who wilfully violates his trust obligations in one respect will inevitably inspire mistrust in others.

(2.) That the executor is not entitled to credit for the item of \$6,300.00 which he claims to have paid Mrs. Maloney, testamentary guardian, seems clear. That fund was admittedly part of the *corpus* of the estate, and by the terms of the will it was the duty of the executor to preserve it intact for the purposes of the trust.

(3.) The auditor's conclusion in respect of the question of rents simply followed the authority of *Watterson's Appeal*, decided by the Supreme Court last fall in this estate on a precisely similar state of facts, and is therefore right.

(4.) But the auditor's conclusion in respect of the sum of \$7,000.00 with which he finds accountant should be surcharged on account of the value of decedent's interest in the firm of Mullin & Maloney is not justified by the evidence. He seems to have drawn his conclusion entirely from the fact that accountant had charged himself with interest on that sum. But this charge is entirely consistent with the theory that accountant had already charged himself with the whole value of the principal of decedent's interest in Mullin & Maloney. The amount with which accountant charged himself in his first account was far in excess of this sum, and may well have included it. An executor can only be surcharged on direct proof or necessary implication of devastavit.

(5.) The status of Mrs. Maloney, the widow, with reference to this estate, was determined in *Watterson's Appeal*, and is not now therefore an open question.

For Mullin, *Messrs. Thompson & Son* and *A. M. Brown*.

Contra, *Messrs. Barton & Sons*, *H. H. McCormick* and *Josiah Cohen*.

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No. 20.

PITTSBURGH, PA., DECEMBER 28, 1881.

Supreme Court, Penn'a.

D. F. PHELPS, by His next Friend, Plaintiff Below,
v. THE PITTSBURGH, CINCINNATI & ST.
LOUIS RAILWAY COMPANY.

To make a valid contract of apprenticeship in this State, under the Act 29th September, 1770, there must be a binding by indenture, the service must be that of an apprentice, in some art, mystery, occupation or labor, and the contract must have the assent of a parent, guardian or next friend.

SHARSWOOD, (C. J., and TRUNKY, J., dissent.

Error to the Court of Common Pleas, No. 2,
of Allegheny county.

Action on the case for damages for the breach
of a contract of apprenticeship evidenced by the
following writing :

"Office MASTER MECHANIC P., C. & ST. L. R'y. }
"DENNISON, OHIO, May 1, 1876. }

"I, D. F. Phelps, eighteen years of age, do hereby agree to bind myself to serve the Pittsburgh, (Cincinnati & St. Louis Railway Company, as an apprentice, for the purpose of learning the machinist trade, for the term of three years from the date of this agreement. It being understood that for the 1st year of 313 days of said service I am to receive from the company 90 cents per day; for the 2d year of 313 days, \$1.10 per day; for the 3d year of 313 days, \$1.35 per day.

"I further agree to forfeit to the said company the sum of fifty dollars (\$50) should I leave their service before the expiration of the time above named.

"Signed, D. F. PHELPS,
"Apprentice.

"Witness :

"ROSS KELLS, M. of M., }
"W. A. STONE, Foreman, } "SUSAN PHELPS.
"GEO. M. BURNS, Time Keeper. }

"INDORSED:—Agreement of D. F. Phelps, apprentice.

"May 1, 1876. Three years. 18 years of age.

"Machinist, occupation."

The errors assigned are sufficiently referred to in the opinion of the court, *infra*.

For plaintiff in error and below, A. M. Watson, Esq.

Contra, Messrs. Hampton & Dalzell.

Opinion by GREEN, J. Filed November 21, 1881.

The cause of action in this case is an alleged contract of apprenticeship. The plaintiff is the minor and the defendant corporation is claimed to be the master. The affidavit of claim sets

forth an article of agreement, dated May 1, 1876, by which the plaintiff claims to have bound himself as an apprentice to the defendant "for the purpose of learning the machinist trade" for the term of three years from the date of the agreement, and annexes a copy of the agreement, and further avers that the plaintiff entered the service of the defendant as an apprentice, and continued therein for some time, when he was discharged without cause, and claims ten thousand dollars damages for breach of the agreement by the defendant. The *narr.* counts upon a contract in writing "that the plaintiff should be employed as an apprentice to the said defendant, and as such apprentice to be taught the art and trade of machinist in their shops at Dennison," rendering good and faithful service "in consideration of his being taught and permitted to learn the art and mystery of said trade." Throughout the entire *narr.* the contract is described exclusively as a contract of apprenticeship, and the breach alleged is a refusal "to allow the plaintiff to continue longer to work as an apprentice" and "to complete and finish said apprenticeship," thereby "preventing plaintiff from acquiring and learning said trade of machinist." He claims ten thousand nine hundred dollars damages as the reasonable value of the trade of machinist of which he was deprived and of the sum he might have made had he been permitted to learn the said trade according to the agreement. There was no claim for wages for the services rendered by the plaintiff during the time he was at work.

In this state of the pleadings the plaintiff offered in evidence the written paper declared upon, and, that being rejected, made offers of verbal testimony to prove a contract of apprenticeship of the same tenor, and a similar breach and to prove that the wages agreed to be paid for the actual service rendered were inadequate "except it be upon the ground that he was to learn his trade and be apprenticed" to the defendant. These offers also were rejected, and the action of the court in refusing them, constitutes the subject-matter of the several assignments of error.

We are clearly of opinion that the learned judge of the court below was right in refusing to receive the testimony offered. The contract of apprenticeship is special and peculiar. Being made by a minor with an employer who is *sui juris*, it is in this State regulated by statute so as to make it obligatory. In order to produce this result the statutory requirements must be complied with. These are to be found in an Act of 29th September, 1770, *Purd. Dig.*, p. 72, pl. 4. The characteristics of the engagement

are thus indicated by the statute: "All and every person or persons that shall be bound by indenture to serve as an apprentice in any art, mystery, occupation or labor, with the assent of his or her parent, guardian or next friend, although such persons or any of them were or shall be within the age of twenty-one years at the time of making their several indentures, shall be bound to serve the time," etc.

There must be a binding by indenture; the service must be that of an apprentice, and in some art, mystery, occupation or labor; and the contract must have the assent of a parent, guardian or next friend, or, by another act, of two or more magistrates when the contract is made by overseers of the poor. All these features are essential to the creation of a valid contract of apprenticeship. Thus, in *Respublica v. Keppell*, 2 Dall., 197, it was held, that an indenture "to serve" only, and not to learn any trade, occupation or labor was not valid, either at common law or under any statute. In *Guthrie v. Murphy*, 4 Watts, 80, it was held, that an indenture executed without the consent of the minor's guardian was void and no action could be sustained upon it, even for necessities furnished by the master to the minor who had left his service before the term expired. To the same effect is *Commonwealth v. Vanlear*, 1 S. & R., 248. The contract itself must be an indenture, and this has been held both in England and in this State to import an obligation under seal. In Reeves' Domestic Relations, 484, the doctrine is thus stated: "Apprentices are persons bound to a master to learn some art or trade * * * An apprentice to be holden must be bound by deed * * * It would seem that an apprenticeship by parol, so far as it lays any obligation on the contracting parties, is utterly void. It will not amount to a hiring by the year which may be by parol: 8 T. R., 374. That an apprentice cannot be bound unless retained as such in a deed is ascertained by the doctrine of the books: Barnes' Notes, 57."

Wood on Master and Servant, 53: "There is no question but that in this country as well as in England, in order to constitute a valid contract of apprenticeship which can be enforced as such, either at common law or under the statutes, the contract must not only be in writing, but must also be by deed or indenture, as the statute provides, otherwise the relation of master and apprentice in its usual or legal sense does not exist."

In the case of *Commonwealth v. Wilbanks*, 10 S. & R., 416, the very point was before this court and it was held, that although the contract was in writing and signed by both parties, yet as it

was without seal, it was invalid as an indenture of apprenticeship. On page 417 the court say: "On inspecting the writing which is called an indenture, it appears to be subscribed by the parties, but not under seal. This is the only objection, so that the single question is, whether there can be a *binding*, by writing, without seal under the Act of 29th September, 1770 * * * I will not say that the word indenture in its largest sense might not comprehend a writing indented, though not under seal. But certain it is, that when an indenture is spoken of, and particularly an indenture of apprenticeship, an instrument under seal is generally understood. It was said by HOLT, C. J., in the case of the *Queen v. Collingwood*, 2 Ld. Rague, 1117, that an apprentice cannot be bound without deed, and the law is so laid down in Burn. Inst., title Apprentice, p. 37, and 1 Slack, 68. It might be fairly inferred, therefore, that our Act of Assembly required a deed, from the sense in which the word *indenture* was usually taken. But we are not left without explanation from other parts of the act, in which the *covenants*, both of the master and the apprentice are several times spoken of, which could not be without deed. The binding of apprentices is a matter of importance, and the forms prescribed by law should be preserved, as they give solemnity to the transaction. It is the opinion of the court that a writing without seal is not an indenture within the meaning of the Act of Assembly. This being the case, the writing now produced is not a valid indenture."

In the case now before us the writing in question has attached to it the signatures, "D. F. Phelps, apprentice," and, "Susan Phelps." To neither of these signatures is any seal appended. There is no execution by the defendant in any manner whatever. Neither the corporate seal nor its name is appended, nor that of any officer or person on its behalf. The paper itself is produced by the plaintiff and it does not appear that any copy of it was ever in the possession of the defendant. On its face it only purports to be a declaration by the plaintiff that he agrees to bind himself to serve the defendant as an apprentice for the purpose of learning the machinist trade, upon certain terms as to payment. There are no covenants or stipulation of any kind on the part of the defendant. We are clearly of opinion that in no point of view can this paper be sustained as a contract of apprenticeship, either under the Pennsylvania Statute or at common law. The case was not presented to us by the learned counsel for the plaintiff in error as any other than a Pennsylvania contract. The paper itself, though dated at Den-

nison, Ohio, does not mention any place at which the service as apprentice was to be performed. But inasmuch as in the *narr.*, the place at which the contract is made is mentioned as "Dennison, Ohio," and in other portions of the *narr.*, "Dennison" is referred to as "Dennison aforesaid," though the contract is not declared upon as an Ohio contract or to be governed by the law of that State, we have looked at the Ohio Statutes to see if they contain any provisions respecting contracts of apprenticeship. We find in the Revised Statutes of Ohio, vol. 1, p. 76, an Act passed March 8, 1831, entitled "An Act concerning apprentices and servants," containing numerous and elaborate details.

Section 1 provides as follows: "That any male person within the age of twenty-one, or female person within the age of eighteen years, may be bound until they arrive at those ages respectively, or for any shorter period to serve, as a clerk, apprentice or servant, in manner herein provided."

Section 2 provides for the binding of destitute children by township trustees.

Section 3 is in the following words: "That the indenture or covenant of service shall be signed and sealed by the father; or, in case of the death or inability of the father, by the mother or guardian; or, in case of an orphan or destitute child, by the trustees of the township of the one part, and by the master or mistress of the other part."

Then follow, in the subsequent sections, many and strict details of the matters which shall be contained in the indentures, and, especially, of covenants on the part of the master or mistress for the instruction and maintenance of the apprentice, also for the recording of the indentures, and for the hearing and trial of complaints by the apprentice against the master and by the master against the apprentice.

So far as any question in the present case is concerned, this statute is much more precise, minute and stringent in its provisions than our Act of 1770. Especially, it requires that the contract shall be by indenture, which shall be signed and sealed by both parties to it.

It follows, that whether the contract be considered as governed by the law of Ohio or Pennsylvania, it must be both signed and sealed by the parties, and as it lacks these requisites it is invalid as a contract of apprenticeship.

Judgment affirmed.

SHARSWOOD, C. J., and TRUNKEY, J., dissent, and STERRETT, J., concurs in the judgment, but dissents from the reasons given in support thereof.

THE WHEELING, PITTSBURGH AND BALTIMORE RAILROAD COMPANY, Defendants Below, v. JOHN GOURLEY and MARY JANE, His Wife.

John Marshall, the deviser of Mary Jane Gourley, one of the defendants in error, agreed to grant a right of way to a railroad company as follows: "In consideration of four hundred and fifty dollars, payable as hereinafter stated, with interest, in full for right of way and all claims for damages, the said party of the first part agrees and binds himself to convey to the said party of the second part, by a good and sufficient deed in fee simple, with covenant of general warranty, the following property. * * * Upon the delivery of said deed, duly acknowledged for record, at any time after the expiration of five years after this date, the said Hempfield Railroad Company agrees to pay to the said party of the first part, the said sum of four hundred and fifty dollars with interest from date." *Held*, a specific agreement to convey in fee, and that the fact that the use to which the company intended to put the land was set out in the agreement, does not in the least obscure its terms. The theory on which equitable ejectment is founded in Pennsylvania, is that the vendor may use his legal title to enforce payment of the purchase money due him as long as he retains a lien upon that title, but when he parts with it or loses his lien, he can no longer resort to the action. He may hold the legal title and yet not be able to use it to enforce payment.

Error to the Court of Common Pleas of Washington county.

This was an action of ejectment brought by John Gourley and Mary Jane, his wife, in right of the wife, who was the devisee of John Marshall against the plaintiff in error, the successor of the Hempfield Railroad Company, to enforce the payment of purchase money alleged to be due for a right of way of the railroad through the plaintiffs' land. The defendant company offered in evidence a deed from John Marshall to A. J. Stillwagon, dated February 23, 1876, which deed contained the following reservations:

"The present grantor reserving to himself, his heirs and assigns, all *damages* arising from the running of the Hempfield Railroad through the above described tract of land, also reserving the right to convey the *right of way* through said land to the said Hempfield Railroad Co. at any time said company may pay the said grantor the damages heretofore agreed upon: 'Together with all the estate,' etc.: 'To have,' etc., 'with the exceptions of the within reservations;' It also contained a covenant of general warranty 'with the exceptions mentioned.'"

The other facts necessary to an understanding of the questions of law arising in the case are fully stated in the assignments of error, *infra*, and in the opinion of the Court below, HART, P. J., which is as follows:

"Nearly all the questions of law involved in the points reserved have been decided by this court in two other recent cases, which, I am

informed, are to be reviewed in the Supreme Court; and, therefore, I shall not now enter upon any discussion of them.

"The only point of difficulty peculiar to this case arises out of the restricted character of the reservation clause in the deed of conveyance from Marshall to Stillwagon, rendering it necessary for the court to determine the construction to be given to the contract of 28th September, 1860, between Marshall and the Hempfield Railroad Company.

"The terms of the reservation in the Stillwagon deed are as follows: 'The present grantor reserving to himself, his heirs and assigns, all damages arising from the running of the Hempfield Railroad through the above described tract of land; also reserving the right to convey the right of way through said land to the said Hempfield Railroad Company at any time the said company may pay the said grantor the damage heretofore agreed upon.'

"Now, the contract of September 28, 1860, between Marshall and the Hempfield Company was partly *printed* and partly *written*. The first portion of the printed matter, with blanks filled up, is as follows: 'Memorandum of an agreement made this 28th day of September, 1860, between John Marshall, of the county of Washington and State of Pennsylvania, of the one part, and the Hempfield Railroad Company of the other part. In consideration of' (then follows in writing) 'Four hundred and fifty dollars, payable as hereinafter stated, with interest, in full for right of way and all claims for damages.' Then follows the printed stipulation, 'The said party of the first part agree and bind to convey to said party of the second part by a good and sufficient deed, in fee simple, with covenant of general warranty, the following property, situated in the county of and State of , that is to say.' Then comes in manuscript the description of the strip of land in controversy.

"In the construction of agreements and contracts of every description the paramount object is to ascertain and enforce the actual intention of the parties; or, as Mr. Chitty expresses it, 'to do justice between the parties to the agreement, by enforcing performance thereof according to the sense in which they mutually understood it at the time it was made.' Or, as it is still more tersely put by Dr. Paley, cited by Chitty: 'Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended, at the time, that the promisee received it.' Chitty on Cont., 10 Am. Ed., 78.

"In the contract before us there are inconsis-

ent clauses. In one the promisor is speaking of a right of way; in the other, of a fee simple. What was his actual intent, as understood at the time, and as he then apprehended it was understood, by the promisee, the Hempfield Railroad Company? Let us look at the situation and surroundings of the parties at the time; for that we have a right to do so in construing a writing is clear: *Williamson v. McClure*, 1 Wr., 402. Here was a land-owner on one side and a railroad company on the other. The company had, as appears in evidence, already located and constructed, and for some years had been operating its road through Marshall's land. By the terms of its charter (P. L., 1851, p. 471), it was the duty of the company to endeavor to agree with the land-owner for the compensation to be allowed him 'for the damages done' by the construction of the road through his land, and the parties had met for that purpose. They must, therefore, be presumed to have had in view the provisions of the charter in that respect. And accordingly, as soon as they escape from the printed form of agreement before them, the manuscript shows they understood that they were treating in regard to 'the right of way and all claims for damages,' etc. It is true, they proceed to fill up the blanks in the printed stipulation for a conveyance in fee simple, with covenant of warranty, etc. Here, then, is a case of an agreement, partly printed and partly written, in which the printed and written parts are inconsistent—not to say, repugnant. Which is to prevail?

"On this subject Mr. Parsons, in his work on Contracts, says: 'Instruments are often used, which are in part printed, and in part written; that is, they are printed with blanks, which are afterwards filled up; and the question may occur, to which a preference should be given. The general answer is, to the written part. What is printed is intended to apply to large classes of contracts, and not to any one exclusively; the blanks are left purposely, that the special statements or provisions should be inserted, which belong to this contract and not to others, and thus discriminate this from others. And it is reasonable to suppose, that the attention of the parties was more closely given to those phrases which they themselves selected, and which express the especial particulars of their own contract, than to those more general expressions, which belong to all contracts of this class.' 2 Parsons' Cont., 516; 4 East., 130; 3 Sandf., 318.

"This rule or principle is perhaps applied more frequently in the construction of policies of insurance, where printed and written clauses

are repugnant, than to any other species of contracts; though it is applicable, of course, to all kinds of instruments partly printed and partly written: *Harper v. Ins. Co.*, 17 N. Y., 194; *Barhydt v. Ellis*, 45 N. Y., 107. In *People v. Saxton*, 22 N. Y., 309, a contested election case, it was held, that the writing of a name upon a printed ballot in connection with the title of an office, is a designation for that office of the name so written, although the printed name for which it is intended as a substitute be not erased; and that in such case the writing is to prevail over the printed letters as *the highest evidence of the voter's intention*.

"In this case it seems to me to be obvious, from the written portion of the agreement of 28th September, 1860, that the attention of the parties was fixed upon the matter of the right of way and the question of damages, and not upon the fee simple title to the land; that Marshall understood himself to be contracting to convey the right of way on payment to him of the damages agreed upon; and that he apprehended, at the time, that the agent of the company, with whom he was negotiating, understood the agreement in precisely the same way. If Marshall's attention was at all directed to the printed words, 'in fee simple,' etc., he probably did not understand their full technical import; and he may have understood them as binding him simply to convey, with warranty, to the Hempfield Railroad Company the right of way over his land *in perpetuum*, and not merely for a limited period of time.

"If this view be correct, it follows that the rule above cited, that the written parts of a contract shall prevail over the printed portions so far as they are inconsistent or repugnant, should be applied to the agreement between Marshall and the Hempfield Company; and, hence, the true construction of that agreement is, that on Marshall's part it was a contract to convey to the company, its successors and assigns, the right of way over the land described, upon the payment of the stipulated damages, and that it did not bind him to convey the fee simple. It is not denied that Marshall's devisee, the use plaintiff, is in a position, under the reservation in the Stillwagon deed to make to the defendant company now a good title to the right of way; and that, in my opinion is all the defendant has a right to demand. The plaintiffs having tendered and put on file a conveyance to the defendant, of the right of way, in proper form and full compliance with the agreement of September, 1860, were entitled to the conditional verdict rendered by the jury. Upon the whole I am of opinion also, on the question

reserved, that the law is with the plaintiffs, and that judgment must be entered on the verdict in their favor."

The verdict on which the judgment was entered was "for the plaintiffs for the strip of land in dispute to be released upon the payment by the defendant to the plaintiffs of \$976.50 in one month, from date, or of judgment on this verdict." This writ was then taken, the assignments of error being:

1. The plaintiffs having described the land they sought to recover, as "extending along the centre line of said railroad (formerly the Hempfield) from the west boundary of Claysville borough on the east to the property of Geo. W. Botkins on the west," the action of the court in permitting them to amend the description thereof so as to make it read "extending along said line from the west boundary of Claysville to the western line of land belonging to G. W. Botkins," was error, because the effect of such amendment was to cause the action to embrace a piece of land entirely different from that described in the original writ.

2. The court erred in receiving in the plaintiffs' case in chief, the evidence referred to in the following offer:

John Gourley on the stand. Plaintiff offers to show by the witness on the stand that on the 28th of September, 1860, the date of the agreement between the Hempfield Railroad Co. and John Marshall, the said Hempfield Railroad Co. was in possession and occupying the strip of land in dispute, and that they so occupied and used it until the insolvency of the Hempfield Company and its sale, in the spring of 1871; and further, that since the sale, and the organization of the present defendant company, that they have been in possession and use of the said strip of land down to this time. This for the purpose of showing that these parties are the successors of the Hempfield Railroad Co., and claim their title.

Defendants object for the reason that the plaintiffs having brought their action to recover possession of this land, the evidence proposed is incompetent and irrelevant.

3. The court erred in receiving in the plaintiffs' case in chief the evidence referred to in the following offer: (The plaintiff) offers in evidence agreement between the Hempfield Railroad Co. and John Marshall, made September 28, 1860, as follows:

"Memorandum of an agreement made this 28th day of September, 1860, between John Marshall, of the county of Washington and State of Pennsylvania, of the one part, and the Hempfield Railroad Co., of the other part. In consideration of Four hundred and fifty dollars, payable as hereinafter stated, with interest, in full for right

of way and all claims for damages—the said party of the first agrees and binds himself to convey to said party of the second part, by a good and sufficient deed, in fee simple, with covenant of general warranty, the following property, situated in the county of Washington and State of Pennsylvania, that is to say, a strip of land extending from the west boundary of Claysville borough, along the centre line of said Railroad, to property of George W. Botkin, being on the south side of Back alley, and in width thirty-three feet on each side of the centre line, in addition to the grounds occupied by the slopes of cuts and fills, but narrowing in width on the north side so as not to embrace the alley. Upon the delivery of the said deed, duly acknowledged for record at any time after the expiration of five years from this date, the said Hempfield Railroad Co. agrees to pay to said party of the first part the said sum of Four hundred and fifty dollars, with interest from date.

"Witness the signature and seal of the party of said first part, and the signature of the President and the common seal of said railroad company.

"JOHN MARSHALL, [Seal.]

"C. M. REED, [Seal.]

"Seal of the Company."

This offer is made for the purpose of showing the agreement between the Hempfield Railroad Co. and John Marshall, the original owner of the land, fixing the amount of purchase money or damages for the said land to be paid by the said company to said Marshall; to be followed by evidence of the insolvency and sale of the Hempfield Railroad, the purchase of the same by John King, Jr., under a decree of the Supreme Court of Pennsylvania, made in March, 1871, by which said decree, or the confirmation of the sale upon the return, the purchaser, John King, was to have the said railroad and its property subject to any lawful claims or rights which might exist prior or paramount to the mortgage upon which it was sold, and also to be followed by evidence of the organization of the present defendant by the said purchaser, John King, under the general railroad law of 1861, and the taking of possession by the present defendant of the railroad and property which was of the Hempfield Company, and of course among that is included this land in dispute.

The defendants object to the reception of the testimony for the reason that this being an action of ejectment, the only question now before the court is one of title, the evidence is incompetent and irrelevant.

4. The court erred in receiving in the plaintiffs case in chief, the evidence referred to in the following offer: (The plaintiff) offers in evidence the charter of the Hempfield Railroad Co., Pamphlet Laws of 1851, page 882, approved May 15, 1850, also supplement on page 470, of same volume, approved April 12, 1851.

This being an action of ejectment the defendants object to the reception of the testimony here, for the reason that it is incompetent and irrelevant.

5. The court erred in affirming—by the entry of judgment upon the conditional verdict—the proposition stated in the plaintiffs' fifth point, to wit: "The defendant corporation, as the successor of the Hempfield Railroad Co., being in the possession of the strip of land under their purchase, is bound to fulfill the contract of the latter company and is liable for the purchase money and interest due upon the said contract."

6. The court erred in its affirmance of the plaintiffs' sixth point, to wit: "The plaintiff has the right to have a conditional verdict against the defendants."

7. The court erred in refusing the defendants' first point, to wit: "That by virtue of the conveyance of John Marshall—from whom the present plaintiffs derive title—to A. J. Stillwagon, dated 23d February, 1866, the fee simple in the land in dispute passed to said Stillwagon; and that consequently there can be no recovery of said land, or any part thereof, by the plaintiffs in the present action.

8. The court erred in refusing the defendants' second point, to wit: "That the contract of John Marshall with the Hempfield Railroad Co., of date 28th September, 1860, cannot be enforced against the defendants, or either of them, by the action of ejectment, because there is no privity between the said Hempfield Railroad Co. and said defendants, or either of them."

9. The court erred in holding that the parties to the agreement of 28th September, 1860, were contracting for the sale and purchase of an easement over the land described in said agreement.

10. The court erred in not holding that the parties to the agreement of 28th September, 1860, were contracting for the sale and purchase of the fee simple in the land described in said agreement.

For plaintiffs in error, defendants below, *H. M. Dougan, Esq.*

Contra, Messrs. Braden & Miller and A. W. & M. C. Acheson.

Opinion by GORDON, J. Filed November 25, 1881.

We cannot agree with the court below in its construction of the contract of the 28th of September, 1860, between John Marshall, the deviser of Mrs. Gourley, and the Hempfield Railroad Company. The learned judge thought the printed parts of this instrument were inconsistent with or repugnant to the written parts thereof, and therefore, in accordance with the rule laid down in *Parsons on Contracts*, and other authorities, adopted the latter to the exclusion of the former.

We have no fault to find with the rule to

which reference is made, but we think it has no application to the case in hand. We can discover neither conflict nor repugnance in or among the different parts of this contract. It is indeed true that the main object of the company was to obtain the right of way for its railroad through Marshall's premises, and it is so expressed in the agreement, but how this can be inconsistent with a grant of the fee of the land over which that way was to pass, we cannot understand. "In consideration" reads the agreement, "of four hundred and fifty dollars, payable as hereinafter stated, with interest, in full for right of way and all claims for damages, the said party of the first part agrees and binds himself to convey to the said party of the second part, by a good and sufficient deed in fee simple, with covenant of general warranty, the following property;" and then follows a description of the land intended to be conveyed. Then in order comes this conclusion: "Upon the delivery of said deed, duly acknowledged for record, at any time after the expiration of five years after this date, the said Hempfield Railroad Company agrees to pay to the said party of the first part, the said sum of four hundred and fifty dollars with interest from date." If this is not a specific agreement to convey in fee, we know not how such an instrument could be framed. Neither can we discover in its words, written or printed, the slightest ambiguity. The very easy and simple explanation of the contract is this: The railroad company wanted a right of way through Marshall's property, and in order to secure that right beyond all peradventure, it bargained with him for the fee of the land over which it was to pass, and so, in turn, Marshall agreed to convey, and that the use to which the company intended to put the land was set out in the contract does not in the least obscure its terms.

But on the third day of February, 1866, Marshall deeded the land in controversy to A. J. Stillwagon, reserving only the right "to convey the right of way through said land to the said Hempfield Railroad Company at any time the said company may pay the said grantor the damage heretofore agreed upon." But by this act Marshall deprived himself of the power of fulfilling his contract with the company, for what he thus reserved was not sufficient to meet his agreement. This fact is, of itself, fatal to the plaintiffs' case, for they ask the specific execution of a contract with the terms of which they, on the part of the vendor, are unable to comply. But under a condition of things, such as this, they cannot compel the vendee to the alternative of paying or turning out until they

have tendered full compensation for the improvements which it has put upon the premises: *Craigh v. Shatto*, 9 W. & S., 82; *Richardson v. Kuhn*, 6 Watts, 299.

But, beyond this, how can the plaintiffs maintain an equitable action of ejectment to enforce the payment of this purchase money, when the legal title is not in them? Or, for that matter, how maintain ejectment of any kind when they have neither title, possession nor right of possession? The theory on which our equitable ejectment is founded, is that the vendor may thus use his legal title to enforce payment of the purchase money due him as long as he retains a lien upon that title, but when he parts with it or loses his lien, he can no longer resort to this action. He may even hold the legal title and yet not be able to use it to enforce payment. As in *Brown v. Metz*, 5 Watts, 164, where the covenant by the vendor was to convey upon the payment of a certain portion of the purchase money, and, that portion being paid, it was held that he could not enforce the residue by ejectment. So *Thompson v. Adams*, 5 P. F. S., 479, is an example in point of the inability of a vendor to enforce payment by ejectment where the legal title has passed out of him, though he may still be entitled to the purchase money.

Again, let us suppose the defendant is compelled to turn out and abandon the land now occupied by it; *cui bona*? The plaintiffs gain nothing; they clear the land of Stillwagon, the owner of the fee, of an incumbrance which otherwise it would be obliged to support, but leave themselves empty-handed. It follows, that the position of the plaintiffs, from any and every standpoint from which it can be viewed, is untenable.

Judgment reversed.

GEORGE H. GARBER v. JOHN G. CONNER.

The collector of delinquent taxes of the City of Pittsburgh has no right to charge fees of any kind, and is therefore not liable to the penalty of the Act of 1814 for taking illegal fees.

Under the Act of 8th April, 1864, the delinquent tax collector is entitled to ten *per centum* on the tax collected, which is his full compensation, and any additional charge of any kind is illegal and void.

A delinquent tax collector has no right to issue a warrant to a constable, such writ being altogether *extra vires*, and the constable has no power to execute it.

The only legal warrant is that of the treasurer to the collector and he has no power to delegate that authority by his warrant or otherwise to some other person.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

J. G. Conner, a tax collector in the Eighth ward, Pittsburgh, issued a warrant to a con-

stable against G. H. Garber, for the collection of unpaid taxes. Garber tendered to Conner his taxes with 10 per cent. allowed him as compensation for collection, but refused to pay the additional costs, claiming that Conner had no authority to issue a warrant to a constable, it being his duty to collect the taxes, and 10 per cent. was expressly declared to be a full compensation for his services as collector. The tender was also made to the constable, but was refused by both. A levy was made and the taxes were then paid, together with 10 per cent., as allowed by the Act of Assembly, a fee of fifty cents to Conner for issuing the warrant, and one dollar and ten cents constable's costs.

This action was brought to recover the penalty for taking illegal fees as provided by the Act of 28th March, 1814, § 26.

When the case was called for trial in the court below, and the evidence for plaintiff was in, the court (STOWE, P. J.), granted a compulsory nonsuit, defendant's counsel citing *Bardley v. Splane*, 28 PITTSBURGH LEGAL JOURNAL, 60, and the refusal to take off this nonsuit was assigned for error.

For plaintiff in error, *Jas. T. Buchanan, Esq.*
Contra, Messrs. R. B. Parkinson and S. H. Geyer.

Opinion by GORDON, J. Filed November 21, 1881.

Connor, the collector of delinquent taxes for the Eighth ward of the City of Pittsburgh, had no right to charge fees of any kind, hence his case does not come within the Fee Bill Act of 1814, and consequently not within its penalty. The Act of the 8th of April, 1864, allows him to collect from the delinquent tax payer ten *per centum* in addition to the amount of the tax, and this ten *per centum* is his full compensation, and any additional charge of any kind is illegal and void. Moreover his warrant to the constable was altogether extra *vires*; he had no power to issue such a writ and the constable had no power to execute it. The only legal warrant was that of the treasurer to Connor; this was his authority to demand and collect the taxes found in his schedule, and he had no power to delegate that authority, by his warrant or otherwise, to some other person. Under the Act of 1834 he might, with the approbation of the treasurer, employ a suitable person to act for him "in the execution of his warrant;" that is, the warrant issued to him by the treasurer. Hence, his deputy, if he has one, acts under the same power that he does. All this is very plain and obvious to any one who takes the pains to read the provisions of the statute, and how this collector and the con-

stable, to whom he directed his sham warrant, came to pursue the course they did, is a matter hard to understand.

But notwithstanding the illegality of the proceedings of these officers; though they were clearly guilty of extortion and might have been punished therefor, we must agree with the court below that they were not amenable to the penalty prescribed by the 26th Section of the Act of the 28th March, 1814. *Judgment affirmed.*

P. MCGOUGH et al., Plaintiffs Below, v. JOHN BIRMINGHAM et al.

Whether a letter of credit is for a single transaction or is a continuing guaranty, depends on the wording of the letter, and the court will not extend its meaning by testimony outside of the letter itself.

A letter of credit being an undertaking to pay the debt of another is construed strictly in favor of the guarantor.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This was an action on the case brought in 1877 by the plaintiffs, a partnership known as the Parker Savings Bank against defendants, a firm known as the Pittsburgh Savings Bank.

The firm of Bates & Goldsborough, composed of F. A. Bates, James Goldsborough and F. A. Dilworth, was engaged in the oil business at Parker's Landing, and Dilworth had an agent in Pittsburgh, Stanley Loomis, who attended to his interests in the firm of Bates & Goldsborough, while R. P. Crawford acted at Parker's Landing as the agent of the entire firm of Bates & Goldsborough. Loomis and Crawford carried on the transactions which gave rise to this suit. Crawford needed money at Parker's and Loomis went to the cashier of the Pittsburgh Savings Bank, John Birmingham, and got the following letter upon which this suit was based:

"PITTSBURGH SAVINGS BANK.

"J. T. STOCKDALE, Pres. | "JOHN BIRMINGHAM, Cashier.

"PITTSBURGH, June 17, 1871.

"Messrs. McGough, Parker & Co., Parker's Landing:

"Dear Sirs:—Any draft for five thousand dollars (\$5,000), drawn upon F. A. Dilworth, with his permission, by R. P. Crawford, attorney for Bates & Goldsborough, will be paid on presentation at this bank.

"Respectfully yours,

"JOHN BIRMINGHAM,

"Cashier."

Dilworth, who was a member of both the firms, of Bates and Goldsborough and the Pittsburgh Savings Bank, knew personally nothing of this letter nor of the acceptance of the drafts made in conformity to the letter, nor of the fact that the Parker Bank had bought about \$200,000 worth of drafts, drawn as described by the letter of credit.

After the delivery of the letter of June 17, 1871, to Loomis, about the time of its date by the cashier of the defendant bank, no word was ever received from the parties to whom it was addressed until five months thereafter, when the attorney for the Parker bank demanded of the Pittsburgh Savings Bank \$70,000, as its liability under the letter of June 17, 1871. Suit was brought for that amount one day before the Statute of Limitations would have been a bar to the oldest draft, but on the trial the plaintiffs limited their claim to one draft of \$5,000, claiming that the said letter was a continuing guaranty for \$5,000. It was admitted that the plaintiffs had received payment in full of about twenty of the first drafts bought on the faith of said letter, and also that the plaintiffs never gave the defendants any notice of their intention to buy drafts on the faith of the letter.

The plaintiffs proved also that Loomis and Crawford had been obtaining money from them by the assurance of the Pittsburgh Savings Bank that Dilworth's credit was good, and that the letter of June 17, 1871, was received from the Pittsburgh Savings Bank to avoid the inconvenience of getting a favorable report of Dilworth's credit from the Pittsburgh Savings Bank whenever they wanted a \$5,000 draft cashed by the Parker bank; that relying on this letter they cashed \$5,000 drafts of the character mentioned in it, construing the letter as always authorizing the cashing of one draft, and never cashing more than one draft at a time until July 7, 1871, when they received a telegram purporting to be sent by Dilworth from Pittsburgh, urging the plaintiffs to cash all drafts offered of the form mentioned in the letter of 17th June, 1871, putting emphasis on the word "any." That telegram was, in fact, sent by Loomis, but from the time of its receipt the plaintiffs bought all drafts offered, and on November 6, 1871, fourteen drafts remained unpaid.

On motion, a nonsuit was granted on the grounds, first, that the letter was not a general warranty, and, second, that the plaintiffs had never notified defendants of their intention to act on the letter of credit.

For plaintiffs in error and below, *W. S. Purviance, Esq.*

Contra, Messrs. A. C. Patterson, J. M. Stoner and Kenneth McIntosh.

PER CURIAM. Filed November 21, 1881.

As the agreement of the defendants was an undertaking to pay the debt of another, the case must be decided according to the terms of the writing. We cannot look outside of it to

ascertain that it means a broader engagement than that expressed on its face. We think it was not a continuing guaranty, but only for one draft of \$5,000. *Anderson v. Blakeley*, 2 W. & S., 237, is a case in point as to the construction of words almost identical with those contained in this letter of credit. This renders it unnecessary to consider the second question raised as to the necessity of notice of the acceptance of the guaranty.

Judgment affirmed.

Orphans' Court.

In Re Estate of DAVID McCANDLESS, Dec'd.

The *lex fort* governs the remedy.

David McCandless died January 12, 1879. Letters testamentary on his estate were granted to E. V. McCandless, who files the present account.

Exceptions were filed to this account; but as the balance shown in it is more than sufficient to satisfy exceptant's claim, it is deemed unnecessary to consider them now.

The only claim presented was that of Rachael Narr, and that was disputed. The facts out of which it arises are these:

On March 31, 1873, a joint and several bond, secured by mortgage, was made at Elizabeth, State of New Jersey, by the Union and Essex Land Company, John N. Wilson, *David McCandless*, James H. Clark and Charles Stevenson, to Rachael D. A. Narr, for \$21,000, payable on or before April 1, 1874, with interest at the rate of seven (7) per cent., the legal rate of interest in that State. Payment of the balance due on this bond, viz., \$16,800 and interest, was claimed out of the fund for distribution here, and this claim was resisted on two grounds:

(1.) Because, as was alleged, under the law of the State of New Jersey, passed in 1880, only the deficit, after the exhaustion by sale of the mortgaged premises, could be recovered from Mr. McCandless' personal estate; and as no sale had taken place, no deficit had been ascertained and consequently no recovery could be had here. The Act of 1880, cited, is still in force, and its first, second and third sections, which are said to bear on this question, are as follows:

SEC. 1. "In all proceedings to foreclose mortgages hereafter commenced, no decree shall be rendered therein for any balance of money which may be due complainant over and above the proceeds of the sale or sales of the mortgaged property, and no execution shall issue for the collection of such balance under such foreclosure proceedings."

SEC. 2. "In all cases where a bond and mortgage has

or may hereafter be given for the same debt, it shall be lawful to proceed first to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings, the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such it shall be lawful to proceed on the bond for the deficiency; and that in all suits on said bond, judgment shall be rendered and execution issued only for the balance of debt and costs of suit."

SEC. 3. "If, after the foreclosure and sale of any mortgaged premises, the person who is entitled to the debt shall recover a judgment in a suit on said bond for any balance of debt, such recoverer shall open the foreclosure and sale of said premises, and the owner of the property at the time of said foreclosure and sale may redeem the property by paying the full amount of money for which the decree was rendered, with interest to be computed from the date of said decree, and all costs of the proceedings on the bond; *Provided*, that a suit for redemption is brought within six months after the entry of such judgment for the balance of the debt."

(2.) Because, as was alleged, claimants' right to collect on their personal obligation was denied on a "bill to foreclose," filed in the Court of Chancery of the State of New Jersey—an exemplification of the record of which case was offered in evidence. The only questions decided there, as appears from the opinion of the chancellor, were (a) whether the defense of money set up in the answer of one of the defendants should be sustained, and (b) whether in view of the first section of the Act of 1880 above recited, the complainants were entitled to a decree for deficiency against the obligors in the bond, the payment of which their mortgage was given to secure. As respects the latter question, the chancellor refused a "decree for deficiency," and cited in support of his decision *The Newark Saving Institution v. Forman*, 6 Stewart, 436.

The balance for distribution here is part of decedent's personal estate.

Opinion by HAWKINS, P. J. Filed November 12, 1881.

As the question now before the court is manifestly one of remedy, its decision might, without more, be referred to the doctrine of *lex fori*: Story's Conf. of Laws, Sections 336, 520 and 572; *Thornton v. Ins. Co.*, 31 Pa. St., 509. That law gives the creditor a right of election to proceed in the first instance, either on his real or personal security; but he must present his claim here for adjudication in order to enable him to participate in the distribution of decedent's personal estate: *Hammett's Appeal*, 83 Pa. St., 392.

The assumption of jurisdiction here is not inconsistent with the law of remedy in New Jersey. The Act of 1880, in force there, was held in *Newark Saving Institution v. Forman*, 6 Stewart, 436, not to interfere with common law remedies, but to provide simply a cumula-

tive remedy in equity. It regulated the order of procedure in bills of foreclosure, but left common law and other remedies in force. There was nothing, therefore, in that Act to have prevented the obligees on this bond from proceeding in the first instance against the obligors personally for the collection of their debt in that State.

In view of the fact that Mr. McCandless was one of several obligors, it seems only just that, having paid his claim, his estate should be placed in a position to compel contribution as between it and its co-obligors. The appropriation here will therefore be made subject to the assignment by the claimants of their securities to the extent of the amount paid to the estate.

For executor, *John G. McConnell, Esq.*

For creditor, *Malcolm Hay, Esq.*

A "SWINE OR HOG" CASE.

The following return to a writ of *certiorari* issued by the Court of Common Pleas, No. 1, of this county was read at the last sitting of the court in *banc*. "Before me, the subscriber, R. C. Stephens, a Justice of the Peace in and for said County personally comes Mrs J. B. Sheriff who upon her oath administered according to law deposeth and says that at Elizabeth Borough in the County of Allegheny on the 17th day of April, A. D. 1881. That Godfred Rhody, coal hauler of said Borough did steal and take away and conceal one of our swine or hogs about nine months old and has it concealed and I charge the said Godfred Rhody with stealing and having in his possession the said swine or hog Worth \$6.00."

The record of the hearing is as follows: "Charge read Deft pleades not guilty * * * parties demand Judgment and with held to 27 & now April 27th 1881. Judgment in case that stealing said hog by Deft is not proven but having said hog or swine in his possession is proven now adjudged that said Defendant Godfred Rhody deliver up said hog or swine to Pltf Mrs. J. B. Sheriff and pay \$7.52 Costs and Plaintiff balance \$3.85 Costs hog not stolen."

Possibly being apprehensive that the court would not understand the record as returned, the Justice added the following: "Remark by Justice. In this suit when it came up both parties claimed the swine or hog and three witnesses on each side swore positive to the hog Pltf and Deft witnesses as the case mite bee but Pltf proved the hog in there Possession from the first of November to the date of Information and Deft newit the same."

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PITTSBURGH, PA., JANUARY 4, 1882.

Supreme Court, Penn'a.

COMMONWEALTH ex rel. BUTTERFIELD and HEALY, Plaintiffs Below, v. McCARTER.

The mayor of a city is a public officer, elected by the people of the city over which he presides, and is not to be regarded merely as the officer of a private corporation.

A writ of *quo warranto* will not issue against a mayor at the instance of discharged policemen.

The right of a private relator to question the election of officers or the admission of a corporate officer is restricted, even in the case of private corporations, to those instances in which individual rights are touched. Mayors of cities are not required to take the oath of office prescribed by the Constitution for State and other officers, they not being named therein.

Error to the Court of Common Pleas of Erie county. The opinion of the court states the facts:

Opinion by GREEN, J. Filed November 7, 1881.

Two persons, describing themselves as citizens of the City of Erie, in the county of Erie, in this State, presented their petition to the Court of Common Pleas of Erie county for a writ of *quo warranto* against the respondent as Mayor of the City of Erie, to inquire by what authority he holds and exercises that office. Healy, one of the relators, subsequently presented a petition asking leave to withdraw from the proceeding, and Butterfield, the remaining relator, filed an amended petition, setting forth that he was a police officer of the City of Erie and had been dismissed from his office by the respondent. It appears from Healy's petition to withdraw that he also was a police officer who had been dismissed; that he had no desire to join in the proceeding and only consented to do so in consequence of the importunity of Butterfield, and upon the promise of the latter that he should incur no cost, trouble or expense by joining with him in the petition. It thus appears that the relators are mere private citizens, having no interest in the office of mayor nor any absolute title to be restored to their position as police officers, in the event of the ouster of the respondent. A rule to show cause was granted

by the court below, which was subsequently discharged at the cost of the relators, who thereupon removed the case to this court by writ of error.

We are clearly of opinion that the action of the court below in refusing the writ of *quo warranto* and discharging the rule to show cause, was right, and for various reasons. The remedy by *quo warranto* has been much considered by this court, and the circumstances in which, and the persons by whom, it may be invoked, have been clearly defined. It was long ago held, in the case of *Commonwealth v. Burnell*, 7 Barr, 34, that the writ would not lie at the suggestion of an individual, against one holding the office of Judge of the Court of Common Pleas. Chief Justice GIBSON, in the course of his very exhaustive opinion, carefully indicated that the clause in the second section of the Act of 1836, which authorized the issuing of the writ on the suggestion "of any person or persons desiring to prosecute the same," was not intended for the redress of a public wrong. He distinctly held that these quoted words "were judiciously added to provide, in imitation of the statute of Anne, for cases in which the public interest might not be involved, and in which the attorney-general might not be willing or bound to prosecute." On page 39, he said: "But that there was no design to let a private citizen prosecute for a public wrong is plain from the third section, which commands the attorney-general to file the suggestion and prosecute the writ where an unchartered association shall have usurped the Commonwealth's franchise by acting as a corporation. On the usurpation of a municipal or corporate office, as I have said, no franchise or exclusive right of the Commonwealth is invaded; and the intervention of a private prosecutor was extended to it, but not as a remedy for a public wrong." This case presented the question of the right of a private prosecutor to invoke the writ as against the incumbent of a public office.

In the cases of *Commonwealth v. Allegheny Bridge Co.*, 8 Harr., 185; *Murphy v. Farmers Bank of Schuylkill County*, 8 Id., 415, and *Commonwealth v. Railroad Co.*, 8 Id., 518, the right of a private relator was denied, to demand the forfeiture of the franchises of a corporation. It was emphatically held that no mere private person, unless he had a private grievance to redress, could be heard on a writ of *quo warranto*, and in no circumstances could he be allowed to claim a forfeiture of the charter. On page 190, LOWRIE, J., said: "We do not hear a private relator in this court claiming to forfeit a charter, and he has no right to such action in any court

where he stands as a mere informer without interest."

On page 518, LEWIS, J., said: "It has been decided in the *Commonwealth ex rel. Murphy v. The Farmers Bank of Schuylkill County* (see ante 415), that a stranger who has no interest in a corporation except that which is common to every citizen, cannot demand a judgment of ouster in a writ of *quo warranto*. The words, 'any person desiring to prosecute the same,' are in that opinion construed to mean, any person having an interest to be affected, or suffering a wrong to be redressed" * * * "No mere stranger should be permitted to demand the forfeiture of a charter granted by the Commonwealth where the State herself does not demand it." In the case of *Murphy v. The Bank, supra*, it was held that, "In questions involving merely the administration of corporate functions, or duties which touch only individual rights, such as the election of officers, admission of a corporate officer or member and the like, the writ may issue at the suit of the attorney-general, or of any person or persons desiring to prosecute the same." It will be observed that the right of a private relator to question the election of officers, or the admission of a corporate officer, is restricted by this language, even in the case of corporations, to those instances in which individual rights are touched.

The next and more advanced step taken in the construction of the Act of 1836, was in the case of *Commonwealth v. Chuley*, 6 P. F. S., 270. There the relator was a rival candidate for the office of sheriff in the county of Allegheny, and the object of the proceeding was to impeach the title of the incumbent and establish that of the relator. Here it would seem was a sufficient personal interest in the very subject of the controversy to warrant the procedure. But it was held, that although the relator had received 12,925 votes for the same office, being the next largest in number to the respondent, yet inasmuch as if he succeeded in ousting the respondent he would not be entitled to the office himself, he could not be heard to question the right of the respondent by *quo warranto* and the writ was denied. On page 272, STORNG, J., says: "This court has construed the words, 'any person or persons desiring to prosecute the same,' to mean any person who has an interest to be affected. They do not give a private relator the writ in a case of public right involving no individual grievance" * * * "And it is to be observed that the Legislature has placed all the five classes of cases enumerated in the act on the same footing in this particular. If a private relator cannot sue out a writ to enforce a forfeit-

ure without having an interest, the statute gives him no greater right when he complains of usurpation of a county or township officer. The right of a relator in each class of cases is defined by the same words." Of course if the relator can show title to the office in himself, he is entitled to the remedy. But here the relator does not pretend to claim the office for himself, nor that he has any interest in it. He was dismissed from service as a police officer by the respondent, as Mayor of the City, and apparently he seeks to punish the respondent for this act, by having him removed from his office. It is very clear the writ of *quo warranto* does not lie for such a person to accomplish such a purpose. It is true, perhaps, that the mayor of a city is not a county or township officer, but he is a public officer, elected by the people of the city over which he presides, and the character and functions of his office are of quite as much consequence as those of a poor director, a road supervisor, or any other township or county officer. He is certainly not to be regarded merely as the officer of a private corporation.

In addition to the foregoing considerations it has long been held that a writ of *quo warranto* is not a writ of right, and the courts are not bound to issue it except in the exercise of a sound discretion. This was held before the passage of the Act of 1836, as to granting informations in the nature of writs of *quo warranto* in the case of *Commonwealth v. Reigart*, 14 S. & R., 216, and since the act in the cases of *Commonwealth v. Chuley*, 6 P. F. S., 270, and *Commonwealth v. Jones*, 2 Jones, 365. In the latter case the considerations which moved the court to refuse the writ were particularly apposite to those which exist in the present case. They are so well expressed in the opinion of Chief Justice GIBSON that we simply quote his very forcible language: "What mischief then has been done in this instance by the choice of an ineligible mayor, if he be so? and who are they that come here to complain of it? They do not pretend that he does not discharge the duties of the office with integrity and ability; or that the interest of the corporation are jeopardized by an irregular or improper exercise of his functions. All the corporators but two are satisfied with him. A constituency of a hundred thousand souls are willing to dispense with a provision in the charter for their benefit. The councils, the chartered guardians of their rights, have not moved; the corporate functions have not moved, and the unsuccessful candidate has not moved. Only two corporators demand a scrutiny; and who are they? It would be too much to say they are actuated by public spirit,

or even by their own interest. They were dismissed from office, not for partisanship, but, as appears in the affidavits, for personal habits that unfitted them, and they could not expect to regain their places should the respondent be ousted. There is but one appetite to which the prosecution can be referred; and to the gratification of it a court will never lend itself. It would waste its time and the public money, did it interfere for a defect of title so unproductive of consequences."

It so happens that the facts and considerations here expressed are almost bodily applicable to the present case. The relators themselves aver their dismissal from office as policeman, and the respondent in his affidavit says this was done for improper performance of their duties. It is perfectly manifest that a mere spirit of personal revenge is the animating cause of the application for the writ, but courts do not administer their functions for the gratification of such motives, and for that reason alone we should feel it our duty to sustain the learned judge of the court below in refusing the writ.

While it is not at all necessary to the determination of the case, it is well enough to add that it is extremely doubtful, to say the least, that there is any merit whatever in the application. The respondent did take the customary oath which was regularly administered to him as it had been to his predecessors in office. There was certainly no refusal to take the oath prescribed by the constitution for the officers therein named. The constitution imposes a penalty of forfeiture of office for refusing to take the oath, but it only names senators, representatives, judicial, State and county officers, as the persons who are required to take it. The Act of 1874, which defines the kind of election expenses that may lawfully be paid by candidates for office, does enumerate municipal officers as among those who must take the constitutional oath, but it does not impose any penalty of forfeiture of office for a violation of its provisions. On the contrary it does impose a specific penalty of fine and imprisonment for violating the act, and, therefore, so far as that law is concerned, no consequence of forfeiture results from a failure to obey its directions. Hence it would seem that the constitutional provision imposing the forfeiture is inapplicable, and the Act of 1874, which includes the respondent within its enumeration, does not impose the penalty sought to be enforced.

Judgment affirmed.

For plaintiffs in error and below, *Messrs. William Beason and Henry Butterfield.*

Contra, Messrs. Marshalls and Vincent.

PLUMER and JONES' APPEAL.

Arrearages of interest due upon the principal sum of a widow's dower at the time of a sheriff's sale of the land, subject to the dower, are discharged by the sale.

A mutual mistake as to the law, which is equally open to both parties, cannot raise an *estoppel*.

The expressions of an erroneous opinion by counsel and a concurrence therein by the court, is of itself insufficient to create an *estoppel* against the client. It must be shown by competent testimony, that, either the client or his attorney agreed or at least asserted that he would act in accordance with said opinion, and that the order or decree of court was because of such agreement or assertion.

Appeal from the Orphans' Court of Allegheny county.

Maria McFarland, widow of John McFarland, filed her petition in the Orphans' Court to compel payment to her of some six years' arrearages of dower or certain property situate in the City of Pittsburgh. This property was allotted to Sarah D. Barr, daughter of decedent, and the said Maria McFarland, in partition, subject to the payment of dower to said Maria.

Samuel Plumer *et al.*, respondents, by their agent and attorney, L. M. Plumer, Esq., filed an answer, denying that the amount claimed by petitioner was due, and alleging, *inter alia*, that they had purchased the premises owned by them, and now sought to be charged, at sheriff's sale, and that said sale discharged the arrears of dower, if any, at that time due and chargeable against said real estate.

Hon. John C. Newmyer was appointed auditor to pass upon the questions raised by the petition and answer. A number of questions were raised before the auditor and passed upon by him. His rulings and those of the court below seem to have been accepted as final on all the questions raised except that of *estoppel*.

The circumstances which gave rise to this question were as follows: The premises owned by Plumer *et al.* had been purchased at sheriff's sale on a writ of *levari facias*. Three days after this sale and before a deed was made, Mrs. Maria McFarland, through her attorneys, moved to set aside the sale, because of inadequacy of price and because of a misunderstanding as to the amount which should have been bid to cover arrearages of dower, amounting then to more than \$3,400. A stipulation to bid \$4,000 was at the same time filed.

On argument of the motion to set aside the sale, the court made the following order: "The court being of opinion, as claimed by attorney for plaintiff, that the widow's dower is not discharged by a sheriff's sale, it being an interest in the land not effected by sale, exceptions dismissed."

It was argued that the respondents were *estopped* from denying their liability to pay Mrs. McFarland. Upon this question the auditor reported as follows: "If this evidence (referring to the order of court, *supra*), be competent in this proceeding, it still does not, in the opinion of the auditor, constitute an *estoppel*. The law was equally open to both parties, and there is no evidence that the opinion of the attorney for Samuel Plumer influenced or misled either the petitioner, Mrs. McFarland, or her counsel, or induced any action on her part."

The report of the auditor on the question of *estoppel* was reversed by Judge HAWKINS, whereupon Plumer *et al.* appealed.

For appellants, *Messrs. Sutton & Plumer*
Contra, Messrs. Bruce & Negley.

Opinion by GREEN, J. Filed November 7, 1891.

We find ourselves unable to sustain the judgment of the learned court below in this case on account of the absence of testimony necessary to make out an *estoppel*. It is the only question in the case and the conclusion of the Orphans' Court was founded upon a single piece of testimony. There is no doubt whatever that the arrearages of dower due to Mrs. McFarland were discharged by the sheriff's sale under the Plumer mortgage. This sale being for a large sum, an application was made on behalf of the widow to the Court of Common Pleas to set it aside, and a bid of \$4,000 was made if the property should be resold.

The court, however, refused the application and dismissed the exceptions to the sale. The only evidence of the action of the court and the reason for it, to be found on this record, is an entry on the Argument List in the following words: "The court being of opinion, as claimed by attorney for plaintiff, that the widow's dower is not discharged by sheriff's sale, it being an interest in the land not affected by sale, exceptions dismissed." If by this was meant that the principal sum of the dower was not discharged it was correct. The dower itself and all future accretions of interest remained and were unaffected by the sale. If, however, it was intended as an expression to the effect that the *arrearages* of annual payments past due were not discharged, it was a mistake. *Dickenson v. Beger*, 6 Norris, 274, is an emphatic determination that arrearages of interest due upon the principal sum of a widow's dower, at the time of a sheriff's sale of the land, subject to the dower, are discharged by the sale. But even if it were true that both the counsel for Plumer in the proceeding on the mortgage, and the Judge of the Com-

mon Pleas, entertained an erroneous opinion on this subject, it by no means follows that any element of *estoppel* would necessarily arise from that circumstance against Plumer, to prevent him from subsequently asserting the exemption of the land from the arrearages. It does not appear that either he or his attorney agreed that if the sale was not set aside Plumer would pay the arrearages or would take title subject to their payment. Yet something of that kind or at least an assertion to that effect to the court, and the refusal of the court to set aside the sale in consequence of such assertion, would be requisite to estop Plumer from now asserting the discharge. The subject is one entirely susceptible of proof by witnesses who are now living and competent to testify. But no such persons have been examined or offered for examination, and of anything like these facts there is absolutely no proof whatever on this record, and of course we cannot infer it. A mutual mistake as to the law, which is equally open to both parties, cannot raise an *estoppel*: *Dungan v. American Life Insurance Company*, 2 P. F. S., 253. In the present case it is not at all clear from the entry given in evidence that the Judge of the Common Pleas meant to say anything more than that the principal fund of the dower was not discharged. That is the plain meaning of the words of the entry and we cannot give them any larger meaning without supposing him to have made a mistake as to the law, and that we have no right to do. In either aspect of the case therefore it is impossible to raise an *estoppel*.

Decree reversed at the costs of the appellee and record remitted for further proceedings.

GORDON and STERRETT, JJ., dissent.

KECK *et al.*, Defendants Below, *v.* McKINLEY *et al.*

Keck & Breneman contracted with one Metzler to erect a building for them. He sent his team to McKinley & Bonnet to procure doors and windows, and with his teamster a written offer from Keck & Breneman to accept his order on them for the price of the materials. Metzler at the same time sent a letter in which he said he would send the order if McKinley & Bonnet were willing to accept it, but if not, he would call and settle the bill himself. The materials were given the teamster and no order then asked for. *Held*, in a suit brought by McKinley & Bonnet against Keck & Breneman, that the letter of the latter firm being a mere offer, there must be an acceptance of it, within a reasonable time, to create an absolute liability.

To make a simple contract binding there must be a definite promise by the party, accepted by the person claiming the benefit of such promise.

Error to the Court of Common Pleas of Clarion county.

The opinion states the facts. The assignment

of error noticed in the refusal of the court to affirm a point that under all the evidence the verdict of the jury must be for the defendants.

Opinion by MERCUR, J. Filed November 14, 1881.

This is an attempt to compel the plaintiffs in error to pay a debt contracted by another. To charge them with an assumption of this obligation the evidence should be clear and satisfactory. On the 30th January, 1877, they entered into a written agreement with one Metzler by which he was to furnish all the materials and labor and erect a building, in consideration of which they were to pay him a sum specified. Metzler entered into an agreement with the defendants in error by which they were to sell him sash, doors, etc. He agreeing to pay one-half when he took the articles away, and the residue in ten days thereafter. When he was about to send for these materials, on the 23d February, Keck & Breneman gave him a letter signed by themselves, and addressed to McKinley & Bonnett, in which it is said: "If Mr. Metzler gives you an order on us for the bill of doors and windows, etc., for our building, we will accept the order and pay it." On the same day Metzler sent a teamster for the materials, together with this letter and one from himself, in which, after stating, *inter alia*, that he would send an order if they were willing to accept it, he added: "If you don't want to accept an order on Keck & Breneman, I will call and settle the bill myself." The teamster delivered both letters and the articles were procured by him. No order was then asked for. Previous to writing this letter the plaintiffs in error had no contract or negotiation with McKinley & Bonnett. They were under no obligation, either absolute or conditional, to pay them for anything Metzler might get. They then had an undoubted right to propose on what terms, and in what form, they would assume a liability. They made the offer conditional. It was not to pay in case Metzler procured the sash and blinds of them; but in case he gave them an order on Keck & Breneman. On the part of the latter it was a mere offer. To create an absolute liability, there must have been an acceptance of the offer within a reasonable time. On the contrary Keck & Breneman heard nothing from them until the 10th of March. Then they received a letter from them in which they say: "Mr. Metzler promised to pay one-half for windows, etc., when taken away from shop, and balance in ten days after that, but he has done neither. He sent a letter with teamster enclosing your willingness to accept an order, that

was not the bargain, and therefore we did not ask for it."

Thus this letter distinctly notifies them that they did not deliver the property in acceptance of their offer; but on the contract which they had previously made with Metzler; and as that bargain was not to accept an order, they had not asked him for one. In language clear and unequivocal, they say they refused to accept the offer of payment by order. It does not help their case that their letter proceeded to say: "Something must be done for we will and must have our pay." Whether this was written under an impression that Keck & Breneman could influence Metzler to pay or with the intention of making some vague claim against them, is of no consequence. The letter states facts which prove they had no legal claim against them. Having refused the offer, it was beyond their power to change its terms and then impose it on Keck & Breneman without their consent. Otherwise it would lack the reciprocal or mutual assent of the parties necessary to constitute an agreement. It is elementary law that to make a simple contract binding there must be a definite promise by the party charged, accepted by the person claiming the benefit of such promise. Chitty on Cont., 11.

It appears the defendants in error put this claim in the hands of Boggs & Weidner, attorneys, to collect of Metzler. They wrote him threatening to sue him. He thereupon got Keck & Breneman to write them in his behalf, in answer thereto, on the 19th March. It was claimed that this last letter contains some evidence of their liability. We cannot discover any language therein, indicating such a conclusion. It was not written in reply to any letter addressed to them, nor to one in which any claim was made against them. It was in answer to a letter to Metzler making a claim against him alone. The answer is for him and in his behalf, giving reasons why he has not paid, and stating what will probably be done unless costs are made by bringing suit. Not one word is said indicating an admission that they owe the bill, or that they will pay it.

The uncontradicted evidence is that on the 23d February Keck & Breneman had money in their hands due to Metzler. They retained it to meet any order he might give to the defendants in error until the receipt of the letter from the latter on the 10th of March. On the receipt of that notice that they had not accepted the proposition and had not obtained any order, the plaintiffs in error paid out all moneys in their hands going to Metzler, on other orders drawn by him on them. He was released from a part of his

contract, and never completed the residue. No settlement was ever had with him. They were under no obligation to accept an order drawn some two months thereafter when they were probably not indebted to Metzler. The offer to accept conditionally was as favorable as the defendants had a right to ask, and this they refused. At no time did the minds of the parties meet and concur in any agreement. A careful examination of the whole evidence fails to disclose any to justify submitting the case to the jury. It is not a case of conflict of evidence, or weight of evidence; but of no evidence. The learned judge therefore erred in not affirming the last point submitted by the defendant below: *Philadelphia & Reading Railroad Co. v. Yerger*, 23 P. F. Smith, 121. It is not necessary to consider the other assignments. The evidence covered thereby was irrelevant.

Judgment reversed.

For plaintiffs in error, defendants below,
Messrs. Wilson & Jenks and J. W. Reed.

Contra, Messrs. Boggs & Weidner.

**THE CITY OF ALLEGHENY, Defendant Below,
v. JANE B. BLACK et al.**

In an action for damages for the taking of land for a public highway, it is not competent for the jury, in estimating the advantages of the proposed improvement to the property, to consider the possibility that the municipal authorities may at some future day open other streets through or near the property, which, when so opened, will render it more valuable for building lots. Because, (1) such streets may never be opened, and (2) should they be opened the owner would be then liable to have the property assessed for such benefits as may follow from the opening.

Where by the opening of a particular street by the municipal authorities the owner of property through which it passes would be enabled to lay out another street or streets thereon, thereby increasing his available frontage and the market value of his property as a whole, such state of facts should be considered by the jury in estimating the benefits. Whatever contributes to the market value is a fair subject for consideration. The test is the market value for any use for which the property is available and not the use to which the owner may desire to put it.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

Opinion by PAXSON, J. Filed November 21, 1881.

The measure of damages for the taking of land for a public highway is the difference between the market value of the entire property at the time a portion of it is taken, or the injury committed, and its market value after such injury. See *Shenango & Allegheny Railroad Company v. Braborn*, 29 P. F. S., 447, where many of the authorities are collected. In estimating the

market value of the land everything which gives it intrinsic value is to be taken into consideration. And it is not to be limited to a particular use: *Ibid.* and see *Cummings v. The City of Williamsport*, 3 Norris, 472. But in considering the advantages it is not competent for the jury to consider the possibility that the municipal authorities may at some future day open other streets through or near the property, which, when so opened, will render it more valuable for building lots. This results from two reasons: (1) Such streets may never be opened, and (2) should they be opened the owner would be then liable to have his property assessed for such benefits as may follow from such opening. This would render him liable to be assessed twice for the same thing which cannot be permitted.

But where by the opening of a particular street by the municipal authorities the owner of property through which it passes is enabled to lay out another street or streets upon his own land, thereby increasing his available frontage and the market value of his property as a whole, there seems no good reason why such state of facts should not be considered by the jury in estimating the benefits. It is true the owner may not choose, and certainly is not bound to open streets through his property and dedicate them to public use, to enhance the value of his remaining property. He may prefer to keep his land to grow cabbages. But as before observed the use is not the test. It is the market value for any use for which it is available. Whatever contributes to the market value of the property is a fair subject for consideration. In the *Pittsburgh & Lake Erie Railroad Company v. Robinson*, 28 PITTSBURGH LEGAL JOURNAL, 119, it was held, in the case of a manufacturing establishment claiming damages for the taking of a portion of its land for a railroad, that it was competent for the latter to show, and for the jury to consider, that the company's depot was convenient to the said manufactory, and that a switch connection was practicable. In the *City of Philadelphia v. Linnard*, 10 W. N., 148, where the owner in rebuilding had been compelled to recede to the new line of Chestnut street, the City was permitted to show in determining the market value of the property after the recession, the probability that the adjoining houses would be set back at some future period, in conformity with the Act of Assembly, which requires such recession in case of rebuilding.

We are of opinion the evidence referred to in the assignments of error should have been admitted. By defendant's offer A, it was proposed

to prove by the witness on the stand and other experts, "that the opening of Frazier street along the west line of the Black property, from Western avenue to Ridge avenue, would enable the owners of that property to subdivide it into blocks of lots by streets and alleys opening into Frazier street, which subdivision would largely increase its value." This offer was objected to for the reason that "the inquiry for the jury is, what are the benefits and damages inflicted by the location of Frazier street proposed, and not as affected by the question of ulterior streets or alleys, that may or may not be made, either under public authority or by the private owners of the property, by reason of the opening of Frazier street." The learned court sustained the objection and excluded the evidence. This was error. The offer did not refer to streets hereafter to be opened by the municipal authorities. It was to show the facilities which the opening of Frazier street would give to the owners of the Black property, to subdivide it by laying out streets and alleys through it, opening into Frazier street, and that such facilities would largely increase its value. We are bound to assume the facts to be as stated in the offer. They show that the opening of Frazier street would enable the owners to subdivide their property, and thus greatly increase its value. That the owners may not desire to avail themselves of the privilege is not material.

Judgment reversed and venire facias de novo awarded.

For plaintiff in error, defendant below, *W. B. Rodgers, Esq.*

Contra, George Shiras, Jr.

COHEN'S APPEAL.

Two judgments were entered on the same day. One only stated on its face that it was to secure the purchase money of the property transferred. *Held*, that the holder of the other judgment could also come in equally with the purchase money judgment, if it could be shown that the records gave notice to the assignee of the purchase money judgment that the other judgment was also for purchase money.

Whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, when the inquiry, if pursued, would lead to knowledge of the requisite facts.

Appeal from the Court of Common Pleas of Luzerne county.

Opinion by GREEN, J. Filed May 2, 1881.

In this case we have reached the conclusion, with some hesitancy, that the decision of the court below was right. The auditor gave priority in the distribution to the judgment held by Cohen over the judgment of the bank. Both judgments were entered the same day, that of

the bank being entered first in point of time. In ordinary circumstances neither would have had priority, and the proceeds would have been divided between them *pro rata*. But priority was claimed for the appellant's judgment on the ground that it was for purchase money, and therefore entitled to priority as against any other judgments entered on the same day. As a general rule this proposition is also true. But it is claimed for the bank that its judgment was also given for purchase money, and was entitled to priority because on its face it was given to secure a debt anterior to the conveyance, and for which a mortgage for the same amount was held, which was expressly stipulated to be paid by the deed conveying the title to the land sold to the defendants in the judgments. The court below did not award priority to the judgment of the bank, but made division of the fund *pro rata* between it and the appellant's judgment. Was this correct? We think it was, in view of all the circumstances of the case. We think, as between Stermer and his grantees, the defendants in both judgments, on the one hand, and the bank on the other, the judgment of the latter must be regarded as having been given for purchase money. Stermer, in trust for himself and others, held the legal title, and on October 21, 1876, executed a mortgage to the First National Bank of Pittston for \$10,000, on the brewery property in question, to secure the payment of a loan to that amount. For this debt the bank held the promissory note of Stermer, indorsed by Luchsinger, Bechtold, Eltinich and Mampel. The auditor found as a fact that the individual interest of Stermer in the property of which he held the legal title, was limited to the value of some mechanics' liens he held against it. The other parties above named were interested with him in the ownership of the property—which was a brewery—and in the business there conducted. On February 3, 1877, in pursuance of arrangements for closing out Stermer's interest in the matter, a deed was delivered by him, conveying the property to the other parties named. Prior to the date of the mortgage to the bank, Stermer had confessed a number of judgments to various persons, and when the deed was made it recited these judgments and also the mortgage of the bank, and conveyed the title expressly subject to the payment of these liens, including the mortgage. As the payment of the debts secured by the judgments and mortgage mentioned, constituted to that extent the consideration of the conveyance, the amount of money which they represented must be considered as purchase money, as between the parties to the deed. On the same day that

the deed was delivered a judgment was entered of record in favor of the bank, and against the grantees in the deed, for the sum of \$10,000. The instrument containing the confession of this judgment recited that it was given to secure the payment of the sum of \$10,000 made on October 21, 1876, by the bank, "on a promissory note drawn by S. Stermer, Ph. Mampel, William Bechtold, Richard Brenton, James R. Wear and L. Eltinich, to the order of Solomon Stermer, and by said Solomon Stermer indorsed to the said First National Bank of Pittston, which note is now unpaid." The instrument further recited that the above note was to be taken up by a new note to be drawn by Mampel, Bechtold, Eltinich and Luchsinger, to the order of Bechtold, and that the judgment was to be held as collateral security for the payment of the loan. On the same day, but at a later hour than the above judgment taken by the bank was entered, another judgment was entered in favor of Solomon Stermer against the said grantees in the deed, for \$1,255.79, and the instrument of confession recited that the obligation was for "a balance of purchase money on lands this day conveyed by plaintiff," and that the judgment was restricted to the premises conveyed. It is contended by the appellee that this was not a purchase money judgment, but, as the parties themselves declared it to be such, we think it must be so considered, as it appears also to have been given for a part of the consideration of the conveyance.

In regard to the judgment held by the bank, it must be further stated that simultaneously with its entry the bank entered satisfaction of the mortgage held against Stermer, though it is found there was no agreement for such entry of satisfaction, and Stermer was ignorant of it. It is contended by the appellant that the judgment of the bank is not a purchase money judgment, and that even if there had been a written agreement between the bank and Stermer that the new judgment should have priority of lien over Stermer's judgment, such agreement being collateral and not spread upon record, would not bind one claiming by assignment from Stermer of his judgment. This latter proposition is undoubtedly correct under the decision in *Parsons v. Wilhelm*, 4 Nor., 218, and cases there cited; but we think the judgment of the bank must be considered as a purchase money judgment, in view of all the circumstances. It is true it is not so stated on its face, but we do not understand that to be necessary in any given case where, in point of fact, the lien, whether it be judgment or mortgage, is given for purchase money. It is also true that the bank was not

the vendor of the property conveyed. But it was a lien creditor of the vendor by a mortgage antedating the conveyance, and the payment of the lien was a part of the consideration of the conveyance and so recited therein. In this judgment had been given by the grantees to Stermer, and by him assigned to the bank, it would undoubtedly have been a purchase money judgment. Why, then, should the fact that it is given directly to the bank prevent its being so regarded when in point of fact the money which it secures does constitute a part of the purchase money of the property? By consent of the vendor the vendees contracted directly with the bank to pay this part of the consideration of the sale. In reality the bank thus holds by good title that portion of the purchase money represented by the amount of the judgment. The only question that remains is, did Cohen, the assignee of Stermer's judgment, have notice of this quality of the bank's judgment? He did not take his assignment until August 8, 1878, about eighteen months after the date of his judgment. He had ample opportunity to examine the record, and of course was bound by every thing that appeared in the title of the defendants, or which, as a matter of record, affected that title. When he looked at the record of the judgment he was taking he saw that it was for a balance of purchase money for property conveyed by the deed recorded February 3, 1877, by Stermer to the defendants. When he looked at the record of that deed he found that it contained an express stipulation that the mortgage to the bank for \$10,000 was to be paid by the grantees, and hence it constituted a part of the consideration of the conveyance. When he examined the record of judgments against the defendants, he found that on the same day that the judgment he was buying was entered, and prior in place on the docket, was entered a judgment in favor of the bank, against the same defendants, for \$10,000, which recited upon its face that it was given to secure the payment of a loan of \$10,000, made on October 21, 1876, on a note upon which the vendor and vendees were jointly liable. In looking at the record of the mortgage which was recited in the deed to the defendants in this judgment, he would have discovered that it was given on the same day, October 21, 1876, that the note for the same amount was made, to secure which the judgment was given. The record of the mortgage further showed that it was satisfied on the same day that the judgment was taken and entered. We think that in these circumstances Cohen cannot be regarded as an assignee without notice, and that, as between him and the bank, the equities are

at least equal. It is a familiar rule that whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, when the inquiry, if pursued, would lead to knowledge of the requisite facts: *Parker v. Neely*, 9 Nor., 52; *Mulliken v. Graham*, 22 P. F. S., 484. We agree with the learned judge of the court below that in view of these facts Cohen could ask for no preference that Stermer could not ask for, and that Stermer, upon manifest considerations, has no claim to preference as against the bank. This view of the case makes it unnecessary to consider the various assignments of error in detail. The facts upon which we determine it are not controverted.

Judgment affirmed at costs of the appellant.

For appellant, *Messrs. C. S. Stark and J. V. Darling.*

Contra, Steuben Jenkins, Esq.

WHITE v. BALLANTINE.

The Act of February 24, 1871, was passed for the protection of municipal claims. They are a charge against the property alone, and the proceedings on them are not personal but *in rem*.

By the Act of 1871, ample provision is made, whereby the property owner may protect himself, and his neglect is at his own peril.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

Opinion by GORDON, J. Filed November 22, 1880.

The property in dispute was sold to James W. Ballantine, the defendant, on a *levari facias* issued on a judgment, obtained on a municipal claim for grading the street or streets adjacent to this property, which claim was filed January 30, 1874. At that time Nathaniel Ballantine was in the possession of the property, and against him the *scire facias* was issued and judgment obtained. It seems, however, as was afterwards determined by an action of ejectment, that the fee of the property was in E. C. White, the plaintiff, and that the possession of Ballantine was only that which he had acquired as White's mortgagee. This then is a summary of the facts upon which this case rests, and the question involved in, and arising from them is, what title did the defendant acquire by his purchase at the judicial sale? The plaintiff contends that inasmuch as the *scire facias* and judgment were in the name of Nathaniel Ballantine, the tenant of the property, the sale falls within the provisions of the Act of January 6, 1864, and passes to the purchaser no more than Ballantine's title, whatever that may be. On the other hand, it is insisted by the defendant that he thereby

acquired the entire title by virtue of the terms of the Act of February 24, 1871. We think, then, that this contention must be determined by the construction put upon this last named act. If this statute does not cover the case, then the hypothesis of the plaintiff must prevail, and in that event, since there was no service of the *scire facias* upon White, the owner, the purchaser took nothing but Ballantine's interest. The question thus presented is not a new one, and our task is rendered light by the opinion of our brother, Mr. Justice PAXSON, in the case of *Emrick v. Dicken*, 27 PITTSBURGH LEGAL JOURNAL, 143. The case here cited is full in point, for the claim filed, the *scire facias* and judgment were against an "unknown owner." And though George Emrick, the owner, was without notice, and at the time resident upon the property, it was, nevertheless, held, that the purchaser took a good title under the Act of 1871. That was a case where the equities of the owner were much stronger than in the case in hand. There, there was no notice to the owner; here the assessment was against the plaintiff's mortgagee, and there is no pretense that he was without notice. But even were he without notice we cannot see any hardship in a law which makes the result complained of possible only through the negligence of the owner. Had the plaintiff complied with the requisitions of the statute, as in good faith he was bound to do, personal notice of the *scire facias* must have been given to him, or the sale under it would, as to him, have been worthless. Who, then, was to blame if the plaintiff's property was assessed in a wrong name? Not the city officers, for there was no registration of the premises to which they could refer. They did what they could; what was proper under the circumstances; they assessed the property in the name of the person in possession, and who at that time claimed to own it. And, indeed, if we should concede to the plaintiff what his counsel contends for in his fourth point to the court below; that is, that he had no title when the assessment was made, then, of course, Nathaniel Ballantine was in fact the owner, and there can be no exception taken to that assessment on any ground. But as, even in the face of such an admission, we can scarcely suppose that it was intended thus to cut up the plaintiff's case by the roots, especially as the verdict in ejectment rendered in December, 1872, determined the title in White's favor, we prefer to rest the case on the Act of 1871. This act was passed for the protection of these municipal claims. They are, as was said in the case above cited, a charge against the property alone, and the proceedings on them

are not personal but *in rem*. Previously to the passage of the act above mentioned, if a property was assessed in a wrong name, and the owner could avoid notice, he wholly escaped from his legitimate share of public burdens; his property was improved and enhanced in value at the expense of the city. The Act of 1871 is therefore a valuable one, and should be enforced according to its intent and purpose. By its ample provision is made whereby the property owner may protect himself, and if he neglects to take care of his own interests he has no one to blame but himself.

Judgment affirmed.

For plaintiffs in error, *Messrs. Weir & Gibson, Robert Robb and D. T. Watson.*

Contra, Messrs. T. C. Lazear and Slagle & Wiley.

Orphans' Court.

In Re Estate of JOHN WATSON, Decased.

- (1.) The expenses of administering a lunatic's estate are entitled to preference over general creditors in the distribution of the proceeds of the sale of such lunatic's real estate sold after his death under order of the Orphans' Court.
- (2.) There is no priority as between claims not in judgment on inquisition found, and those subsequently accruing.

In February, 1874, an inquisition was had in which John Watson was found to have been a lunatic for a period of three months then last past. His estate was appraised at \$111,500. The appraisement was high and the value of the property embraced in it afterwards greatly depreciated as will hereinafter be seen. The liabilities were supposed to be about \$20,000. John S. Lambie, Esq., was appointed committee.

Mr. Watson died in May, 1880, and letters of administration on his estate were granted to his son, George Watson, the present accountant. The balance for distribution here is \$4,669.38, being proceeds of the sale of real estate under order of this court for payment of said decedent's debts.

Four classes of claims have been presented here for allowance, for each of which priority of payment out of the fund for distribution asserted:

- (1.) Debts contracted by Mr. Watson prior to the time at which he was found to have been of unsound mind.
- (2.) Judgments obtained on contracts made by the committee, or for the maintenance of some member of the family against said committee, after the inquisition, and before Mr. Watson's death.
- (3.) Expenses of administration of the lunatic's estate.

(4.) A claim of Anna B. Hahn, daughter of Mr. Watson, for balance paid and expended for maintenance of four minor children, her sisters.

(5.) There was a fifth class not in judgment arising on contracts made between the dates of the inquisition and Mr. Watson's death as to which no priority was claimed.

(1 and 2.) The amount of the claims embraced in the first and second classes was admitted but their priority was denied. They involve, therefore, simply a question of law.

(3.) The claims embraced under the third class are as follows:

a. John S. Lambie, Esq., claimed appropriation to compensation of ordinary services rendered as committee in the administration of the lunatic's estate. The amount claimed by him (\$1,994.97) was allowed, in the confirmation of his account in the Court of Common Pleas, but not paid, the cash on hand being insufficient.

b. An unpaid balance of costs (\$102.25) taxed in the inquisition of lunacy.

c. Fees of A. M. Brown, Esq., for professional services rendered as attorney for the committee, \$380.

d. Auctioneer's (John D. Carson, assignee), claim for services relating to the attempted sale of Fifth avenue property, \$131.07; less amount paid by committee, \$41.85.

The claims of A. M. Brown, Esq., and John D. Carson are based on contracts made by John S. Lambie, committee.

It was objected to all these claims that they come too late, because, it was said, they should have been settled in the Court of Common Pleas, which alone had jurisdiction. And it was specially objected to Mr. Carson's claim that, as the services on which it is based, related solely to the Fifth avenue property, that property alone was liable. The fund for distribution here is derived from the sale of other property than that.

(4.) The material facts relating to the claim of Mrs. Hahn are these:

On March 16, 1876, Mrs. Hahn took charge of her father, said John Watson, and his four youngest children, Lillie, aged three, Grace, aged eleven, Carlotta, aged nine, and Irene, aged six. Her father remained with her until October, 1877, and the children have remained until now. She was appointed guardian of these children by this court in 1877. She also had charge of another minor child, William, for about four months prior to his death. On April 15, 1876, John S. Lambie, committee, asked and obtained an order from the Court of Common Pleas fixing an allowance for the maintenance of John Watson and his minor children, Wil-

Ham, Lillie, Grace, Carlotta and Irene, above named, at \$2,500 per annum. On March 24, 1877, an examiner seems to have been appointed on the application of Lillie and William Watson, minor children of John Watson, for an allowance, who reported June 2, 1877, that the value of Mr. Watson's estate was over \$54,000, and his liabilities, \$20,417.54; that the allowance of \$2,500 theretofore was excessive and should be reduced to \$2,000; that even with this reduction it would become necessary in time to sell part of the realty to make up deficits; and that, of the reduced allowance, Mrs. Hahn should receive \$1,400 for the maintenance of her wards. No action seems to have been taken by the court on the findings of the examiner. On March 22, 1879, a petition was presented to the Court of Common Pleas on behalf of Mrs. Hahn, setting forth, *inter alia*, that she had laid out and expended on behalf of her said wards, \$3,769.54, and after crediting Mr. Lambie with \$1,860.01, paid on that account, prayed the court to direct the payment of the balance due her, \$1,909.13, and fix a weekly amount for the maintenance thereafter of said wards. To this petition Mr. Lambie answered that he had no reason to doubt the correctness of the account stated by Mrs. Hahn; that the personal estate of Mr. Watson had been exhausted; that the assessed value of his real estate was \$52,795; that the rental value from April, 1879, to April, 1880, would be about \$1,508; that there were unpaid mortgages aggregating to \$17,700, with a large amount of interest due thereon, and unsecured claims aggregating about \$1,700; that on inquiry he believed that said realty, if sold, would not produce enough to satisfy said mortgages; and that in view of these facts he had declined to make any farther disbursements for the maintenance of Mr. Watson's family until his debts had been paid without an order of court. On April 19, 1879, "the court being satisfied, that notwithstanding the matters alleged in the answer, the said lunatic and his family are entitled to a maintenance out of the estate of the lunatic," ordered, "that John S. Lambie, committee of said lunatic, pay to said Anna B. Hahn, guardian, the sum of fifty dollars per month, for each month, from January 1, 1879, until the further order of this court, toward the support and maintenance of said wards, without prejudice to her claim as set forth in her said petition." No further order for allowance of maintenance seems to have been made. From its date until Mr. Watson's death, Mr. Lambie paid Mrs. Hahn \$424.85, thus leaving an unpaid balance at the rate of \$50 per month from January 1, 1879, of (say) \$400.14. Mrs. Hahn claims

now a balance of \$3,409.78, made up as follows:

Balance due March 22, 1879.....	\$1,909 53
Maintenance since March 22, 1879.....	1,500 25
	<u>\$3,409 78</u>

She does not give Mr. Lambie credit for \$424.85, paid as above stated, in accordance with this balance.

The account presented by Mrs. Hahn shows total expenditures for her wards from March 16, 1878, to May 16, 1880, of.....\$5,269 79
On which she credits Mr. Lambie with.....1,860 01

Then follows a balance struck, of.....\$3,409 78 as above stated. But as this balance is immediately followed by credits, making the \$424.85, it is assumed that the latter was omitted by mistake in striking her balance. This additional being allowed, her true claim would be \$2,984.93.

The evidence establishes the fact that Mrs. Hahn could and should have maintained her wards on the allowance of \$50 per month.

It also shows that they were maintained in the same style by her as they had been before the inquisition by her father.

Opinion by HAWKINS, P. J. Filed November 22, 1881.

(1.) No one disputes the existence of the rule that the costs and expenses of administering a trust are entitled to a priority of payment out of the trust estate. There may be a question as to the amount; but that once ascertained those who seek to share in the estate with respect to which they were incurred take subject to the amount so ascertained.

The inquisition of lunacy in this case settled the question of the necessity of a trust for the preservation and management of Mr. Watson's estate. It made necessary the services of a committee, and the incidental costs and expenses of administration of the trust. The creditors of Mr. Watson were as much interested in the purposes of the trust as Mr. Watson himself and his family. The estate was their only security; and they could only obtain satisfaction of their claims through the committee during Mr. Watson's lifetime. They were therefore as much bound for their proportion of the costs and expenses. They have no right to complain of accumulated costs and expenses growing out of several years of administration for they had it in their power long since to have terminated their interest, and, therefore, their responsibility for further costs and expenses by the collection of their claims.

The amount claimed by Mr. Lambie for services as committee, having been fixed by a decree of the Court of Common Pleas, it is not now open to attack here: *Wier v. Myers*, 34 Pa. St., 377. And Mr. Lambie was no more bound to deduct his compensation as it was

earned than an executor: *Cobaugh's Appeal*, 24 Pa. St., 143. His postponement of their collection did not alter their character: *Id.*, and could not injure claimants here. His account having been confirmed without objection by the court having jurisdiction, it must be assumed that the claims credited to him there as having been paid, were properly paid; and it cannot be imputed to him as a fault that there were not assets in his hands to pay his own claim. He is clearly entitled to priority of payment in this distribution over claims which were not in judgment at the date of the inquisition.

The same reasons exist for maintaining jurisdiction in this court as respect allowance of the claims of A. M. Brown and J. D. Carson, and for balance of costs. It is not a valid objection to the claim of J. D. Carson that the service on which it is based did not relate to the sale which realized the fund here for distribution. The sale to which those services did relate was part of the scheme of administration, and must be assumed here to have been necessary. Suppose nothing should be realized out of a sale of that property, is the auctioneer to lose compensation? Should something be realized, the same parties who claim here may claim there. The allowance of this claim out of the fund here for distribution will not only be just to this claimant but without injury to those making objection.

(2.) Had John Watson continued of sound mind until his death, there can be no doubt that debts contracted by him for the support of himself and family from and after May 16, 1875, would have been entitled to *pro rata* allowance with other debts, which were not liens at the date of his death, in the distribution of the proceeds of sales of real estate made by his executor. Debts contracted for his support, being a lunatic, and the support of his family, stand in no better position. The decree of the Court of Common Pleas fixing an allowance does not give a preference as respects the lunatic's real estate. That court has no power to create even a lien (*Wright's Appeal*, 8 Pa. St., 57), much less to give a preference on the real estate of a lunatic. The decree limits the amount which may be used for the maintenance of the lunatic and his family out of available assets, but is not an appropriation *ab initio* of those assets, even when they are personal. Creditors may proceed at any time for the collection of their claims, and by exhaustion of the lunatic's estate, render the decree for allowance inoperative thereafter. The committee may appropriate personal assets toward maintenance within the limits prescribed by court just as the owner if sane could have done; but a general order of allowance

does not authorize him to sell real estate and appropriate the proceeds toward that purpose without further order. Real estate can only be sold on a special application which must set forth not only what may be required for the maintenance of the lunatic and his family, but also "a statement of the debts due by the lunatic." Why "a statement of the debts due by the lunatic" if the maintenance of the lunatic and his family is entitled to a preference over all other debts? Has a debt created for maintenance any higher rank than a debt contracted for purchase of the real estate in the distribution of the proceeds of same real estate subsequently sold, or than any other debt contracted prior to the inquisition? If there is any superior equity it is certainly in favor of debts contracted by the owner prior to his being found to be of unsound mind. If debts contracted for maintenance are entitled to a preference, the whole estate may in course of time be swept away from *bona fide* creditors. Surely the law never contemplated such a result.

The next inquiry is, to what amount is Mrs. Hahn entitled? The allowance fixed by the court is at least *prima facie* evidence of that amount. She would naturally and with reason look to the allowance made as the standard by which she was to regulate her expenditures. The record of the decree was open to the creditors and if they were dissatisfied with the amount the remedy was in their own hands. So far therefore as Mrs. Hahn's expenditures were within the limits fixed by the Court of Common Pleas, it would be unjust and inequitable to repudiate them. The evidence does not sustain the excess over that limit.

(3.) The judgments obtained against the committee are not entitled to any priority of payment here. They did not create a lien, but simply operated as a liquidation of the amount due: *Wright's Appeal*, *supra*. The 25th Section of the Act of 24th February, 1834, P. L., 77, preserves the priority of judgments which were liens at the time of the defendant's death. It does not create priority: *Aurands*, 34 Pa. St., 151.

Creditors whose claims antedate the inquisition stand in no better position than if their debtor had continued sane. Claims for maintenance contracted by him, being sane, would have been classified as general debts and payable *pro rata* with those debts which now seek a preference had no judgment been entered thereon. As judgment against the committee gave no lien they stand on the same footing.

For creditors, *Messrs. W. B. Negley, P. H. Winston, C. F. McKenna, J. S. Lambie and J. H. Baldwin*.

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FORMER JEOPARDY.

A Valuable Communication on the Subject from
Hon. Thos. M. Marshall.

To the Editor of the Pittsburgh Legal Journal :

An incidental remark of mine, made to a reporter the day after my return from the trial of Patrick Dolan, at Uniontown, having elicited considerable comment from the press and out-cropped into various interviews with lawyers, I deem it proper to say that I did not seek to give publicity to my opinion. It occurred in this way: The reporters, when they called at my office, inquired what would be the future movements of the counsel for the defense. I informed them that I could not foreshadow the movements which might be made, as I had not the advantage of a conference with the other counsel of the defendant, adding at the same time, that I had no doubt a motion for a new trial would be made, and in the event of a refusal to grant the same, a writ of error would be taken to the Supreme Court. With a glibness, very becoming in a reporter, one of them replied: "Suppose you get a new trial and they convict your client of murder in the first degree?" I said: "I think that result is scarcely possible. I look upon that question as settled. Upon another trial the defendant cannot be convicted of a higher grade of offense than the first conviction." When this casual remark was made I had no apprehension that so many newspaper comments and interviews would result therefrom. I have had the pleasure and satisfaction of reading editorials pronouncing "Mr. Marshall's point wrong;" also interviews alleged to have been held with judges and "members of the bar," wherein "Mr. Marshall's point" was not favorably entertained. I must here disclaim all credit for raising the point. It is much older than my span of life and has been known to well-read lawyers for many years. I do not believe that Judge STOWE is correctly reported as condemning the view of the law, that "once in jeopardy" is a good plea to an indictment. One case of practice in our local court is cited as authority against the doctrine: A man was convicted of manslaughter whilst Judge KIRKPATRICK was district attorney; a motion was

made for a new trial, and granted. Upon the second trial he was convicted of murder in the second degree. I believe all this occurred, but it is not conclusive of anything except that the district attorney accepted a verdict contrary to law, and the prisoner's counsel was not informed of a rule of law which had been enunciated and established by decision for many years. Without pausing to enquire as to the propriety of judges giving opinions upon questions not before them, but which may come before them, involving human life and liberty, I beg leave to say, that in my opinion, in principle and authority, the rule is well settled, that a verdict of murder in the second degree is an acquittal of the higher degree; and in case of the granting of a new trial, or a reversal by the Supreme Court on writ of error, the prisoner cannot legally be convicted of murder in the first degree. I had occasion to examine this question many years since. I had defended a citizen of McKeesport on a charge of murder. He was convicted of manslaughter. Upon a motion for a new trial, His Honor Judge McCURE, suggested the very question now under discussion. My examination then was not as satisfactory as I could have desired, but I came to the conclusion that the verdict of guilty of manslaughter protected the defendant against conviction of any higher grade of offense, and I have never expressed any other opinion upon the subject.

In the trial of a homicide case, the jury when sworn are instructed to pass upon four distinct issues if necessary. First, is the defendant guilty or not guilty? If guilty, what is the grade of guilt? Is it murder in the first degree? Is it murder in the second degree? or is it voluntary manslaughter?

Murder in the first degree is a willful, deliberate and premeditated killing. Murder in the second degree is a malicious killing, without the specific intent to take life. Manslaughter is a killing in the heat of blood upon provocation. Our statute expressly imposes upon the jury the duty of fixing the degree in murder.

To a mind gifted with ordinary logical power, it ought to be plain, that when they render a verdict of murder in the second degree, they find the prisoner not guilty of deliberation and premeditation, the elements which constitute the higher crime; and on a second trial the only questions open to adjudication are those embraced in the original verdict. The Constitution of Pennsylvania reads, Article I, Section 10: "No person shall, for the same offense, be twice put in jeopardy of life or limb." The Constitution of the United States reads, Article

V, amendment: "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb."

At the portal of inquiry arises the question, when is a defendant in jeopardy? In *The Commonwealth v. Cook*, 6 S. & R., 577, the question came before the Supreme Court in this way: Three persons were jointly indicted for murder. The jury retired to consult as to their verdict, and subsequently came into court ready to render a verdict of acquittal as to two of the defendants, but unable to agree as to the third. The court refused to receive the verdict, the jury then informed the court that they never could agree, and they were discharged. Afterwards the defendants were again indicted for the same offense. Judge TIGHELMAN discharged all three of the prisoners on the ground that they had once been "in jeopardy," using this emphatic language: "For my own part, thinking that their blood would be on us, if they were convicted of murder in the first degree on a second trial in this court, I am of the opinion that they should be discharged from this indictment." By this case the law was settled in Pennsylvania, that whenever a jury was sworn in a capital case the prisoner is "in jeopardy," provided the court has jurisdiction and the indictment is sufficient in law. In *The Commonwealth v. Chue*, 3 Rawle, 498, GIBSON, C. J., went even farther than Judge TIGHELMAN, and held that not only was the prisoner "in jeopardy" when the jury was sworn, but "he is in jeopardy the instant he is called on to stand on his defense." I do not quote this as the law, but to show how far great judges have gone, even beyond the doctrine of *The Commonwealth v. Cook*, in favor of the plea "once in jeopardy."

In *McFadden v. The Commonwealth*, 11 Har., 12, BLACK, C. J., says, in affirming the doctrine, that the moment a jury is sworn the prisoner is "in jeopardy:" "Neither the constitution nor the rules of the common law will permit a man to be twice tried for the same offense." There are other decisions in our own courts to the same purpose, and I am not aware that they have ever been overruled except by "the press." But it is said that the prisoner by his motion for a new trial "waives his privilege." This is a confusion of terms. The clause in the Constitution of the State is not a privilege. It is an inexorable rule of law which the courts must obey. A man cannot authorize a court to take his life, except by the due course of law for offense committed. That the verdict of murder in the second degree is a verdict of acquittal of the higher grade, is not open to dispute. It has received adjudication in various States. In our

State, in *Girts v. The Commonwealth*, 10 Har., 351, where a party was indicted on ten counts for passing counterfeit money, the jury rendered a verdict of guilty on the four last counts, but were silent on the six counts preceding. The Supreme Court held that silence, as to these counts, was a verdict of acquittal. It has not escaped my observation that a loose *dictum* of Judge GRIER, reported in 6 Penn'a L. J., 14, is cited as a decision upon this question under discussion. It was not a decision and is of no authority unless the reason assigned with the expression of the judge is well founded. That case was *The United States v. Harding and others*, tried before Judge RANDALL, the then District Court Judge. Two of the defendants were convicted of manslaughter; a motion was made for a new trial before Judge RANDALL. Before that motion came on for argument, Judge RANDALL died and was succeeded by Judge KANE. The argument for a new trial was heard. Judge KANE wrote an opinion granting the new trial. Judge GRIER, who had not heard the case, but was inclined to refuse the motion for a new trial, gave utterance to the warning, now quoted as a decision. The question was not before the court. The prisoners and their eminent counsel accepted the new trial.

The appeal of a prisoner for a new trial is for alleged error in the verdict of guilty, and in no way or manner affects the verdict of not guilty of the higher crime. The principles involved in this inquiry are not new or of recent origin. Hundreds of years since, Lord COKE, not in "an interview," decided as our own judges have. Those curious to look into the question will find almost innumerable authorities touching the finality of a verdict for the lower offense, although in England they have no degrees in murder, nor was it of old time within the power of the court to grant a new trial.

See 4 Coke, 89 to 47; 2 Hawkins' P. C., B 2, C 36, also chap. 47, § 12; 2 Hale's P. C., 246; 1 Tremaine's P. C., 20; Kelyng, 94, 98, 105, 106; Starkie's Crim. Pl., 357.

Lord COKE, in the case of *Holcroft*, says: "If a man commit murder and is indicted and convicted or acquitted of manslaughter, he shall never answer for the same death."

In *United States v. Gibert et al.*, 2 Sumner's R., 19, Justice STORY exhausts the law bearing upon this subject and adopts the decision of Judge TIGHELMAN, in *Cook v. The Commonwealth*, as the true and logical rule as to "once in jeopardy."

The authorities in this country are very numerous, that a verdict of guilty of one degree of

crime is an acquittal of all other degrees not included in the verdict. The same rule is applied in regard to the various counts in an indictment.

The first case in point of time was tried in Vermont in 1803, 2 Tylers's R., 471. The defendants were indicted for riot and assault and battery, and were convicted of assault and battery. The defendants appealed and the State contended that the whole case was reopened. The Supreme court held that they could only be tried for the offense of which they had been convicted.

Campbell v. The State, 9 Yerger, 333, also reported in *Leading Criminal Cases*, 499, is full to the same conclusion, that a new trial only opens the conviction and not the acquittal. The following cases are to the same purpose and sustain the contention that a new trial or reversal of judgment does not open up more than the verdict of conviction :

The People v. Knapp, 26 Michigan, 112; *Stoltz v. The People*, 4 Scammon, 168; *Emon v. The State*, 1 Swan, 14; *Morris v. The State*, 8 Smeedes & Marshall, 762; *Lithgow v. Commonwealth*, 2 Va. Cases, 297; *Jordan v. The State*, 22 Georgia, 546; *Hurt v. The State*, 25 Mississippi, 378; *Jones v. The State*, 13 Texas, 168; *State v. Tweedy*, 11 Iowa, 352; *Brennan v. The People*, 15 Illinois, 511; *People v. Gilmore*, 4 California, 376; *State v. Hill*, 30 Wisconsin, 416; *State v. Marlin*, 30 Id., 216; *State v. Belden*, 33 Id., 120; *Slaughter v. The State*, 6 Humphrey, 410; *Clem v. The State*, 42 Indiana, 420.

Several of these cases are identical with the case of *Patrick Dolan*. The case in 33 Wisconsin (*State v. Belden*), the defendant was indicted for murder, the verdict was manslaughter in the second degree. On motion of the defendant a new trial was granted. The court held that the prisoner could not be tried for a higher offense than the conviction. The line of authorities might be largely increased by reference to the cases cited in the notes to Wharton on Pleadings and Practice, Sections 465, 788, 896. Says Mr. Wharton : "The rule is, if a conviction could have been on the first indictment of the offense charged in the second indictment, then the conviction or acquittal bars the second."

The consideration, which to my mind is conclusive of this question, arises from the fact that the Commonwealth has no right to move for a new trial or in any way disturb a verdict of not guilty. Nor is she entitled to a writ of error. If a competent jury say the defendant is not guilty of murder in the first degree, once in jeopardy, is a conclusive answer to further controversy as to that crime. I believe that Mr.

Bishop, Mr. Wharton and every respectable author treating upon the question under consideration, concedes that the weight of authority is that "once in jeopardy" is an end of jeopardy. In Ohio and two or three other States the courts have held otherwise, but the number and weight of judicial authority is certainly that the defendant cannot be tried again for a higher grade than the verdict of conviction. I have not taken the hours employed in this case from my Christmas for the purpose of replying to newspaper criticisms or answering those "members of the bar" who were interviewed, but solely to lay before honest, fair-minded readers the reason and authority that induced me to express my opinion.

THOS. M. MARSHALL.

Supreme Court, Penn'a.

LOUISA JONES' APPEAL.

- (1.) Whether a review is demanded for error in law apparent in the decree, or for new matter which has arisen after the decree, or for new proof that has come to light since the decree, the statutory limit of five years applies. The error in blending the distribution and administration accounts appears in the decree. If a decree, or part thereof, be void, it would be so treated without reference to this statute.
- (2.) The absolute confirmation of an account in which administration and distribution have been mingled, does not protect accountant as respects items of distribution as against creditors, when no refunding bonds have been taken and approved by the Orphans' Court.
- (3.) A judgment against the administratrix of the deceased surety on a guardian's bond is conclusive of the legality of the claim against the estate.
- (4.) The better place to enforce the personal liability of the administratrix is in the Orphans' Court. No bill of review was necessary, but it did no harm here.
- (5.) The granting of a rehearing of so much of an account as is alleged to be error, is preliminary to the inquiry respecting such error, and no appeal lies from it. If the rehearing be refused, the refusal is final and from it an appeal lies.

Appeal from the decree of the Orphans' Court of Allegheny county.

H. Hepburn and H. B. Wilkins were appointed guardians of the estate of Mary C. Livingston, a non-resident, in 1854. Samuel Jones became surety in the sum of \$20,000, conditioned for the faithful performance of their duties. Hepburn was the active guardian, but died in 1861, Wilkins then assuming the duties. Samuel Jones died in 1863, and letters of administration were granted to his widow, Louisa Jones. Miss Livingston came of age in 1867 or 1868, and married Mr. L. Delafield. In 1870 Mrs. Jones filed her first and final account, in which she mingled administration and distribution. No exceptions were filed to this account

and it was confirmed absolutely. She took no refunding bonds from the distributees. In the meantime Mrs. Delafield was endeavoring to obtain a settlement with her guardian, and finally obtained a decree of the Orphans' Court against him for \$115,000. She then brought suit on the guardian's bond against Louisa Jones, administratrix of Samuel Jones, obtained a judgment for \$20,000 thereon in the Court of Common Pleas, and thereupon filed a petition in the Orphans' Court, asking that said Louisa Jones, administratrix, be ordered and decreed to pay the said sum of \$20,000, with interest, to petitioners. This petition was subsequently amended by adding an additional prayer that the decree of confirmation of the account of Mrs. Jones be set aside as respected the distribution amongst the next of kin.

The court below set aside the decree of confirmation as respected distribution amongst the next of kin, and directed its clerk to give notice by advertisement of the audit of said account at the next term. (See opinion of HAWKINS, P. J., reported in 28 PITTSBURGH LEGAL JOURNAL, 375).

From this decree Mrs. Jones appealed.

At the ensuing (June) Term, Mrs. Jones' account having been advertised by the clerk as for audit, in pursuance of the order of court, and exceptions having been filed thereto, the account was accordingly audited, and the accountant was surcharged by the court below, with the amount for which she had claimed credit as having been distributed amongst the next of kin; and \$22,231.75 thereof, being the amount of the principal, interest and costs of the judgment obtained as aforesaid against Mrs. Jones, was appropriated to Mrs. Delafield. With this decree the court below filed the following opinion:

"The present decree of surcharge and distribution is made on the theory that the former decree of the court, in setting aside the confirmation of Mrs. Jones' account, was interlocutory. The latter decree contemplated further proceedings, and as no execution could issue until those proceedings were had, no actual loss could accrue to her. The present is the final decree, and from it alone an appeal lies."

From this decree also Mrs. Jones appealed.

The Act of October 13, 1840, P. L., 1841, p. 1, which provides for bills of review in the Orphans' Court, is as follows:

"The Judges of the Orphans' Court of the Commonwealth of Pennsylvania, within five years after the final decree, confirming the original or supplementary account of any executor, administrator or guardian, which has or may be hereafter passed as aforesaid, upon petition of review being presented by such executor, administrator or guardian, or their legal representatives, or by

any person interested therein, alleging errors in such account, which errors shall be specifically set forth in said petition of review, and said petition and errors being verified by oath or affirmation; said Orphans' Court shall grant a rehearing of so much of said account as is alleged to be error in said petition of review, and give such relief as equity and justice may require, by reference to auditors or otherwise, with like right of appeal to the Supreme Court as in other cases, except that the appeal shall be taken under the provisions of this act, within one year after the decree made on the petition of review; *Provided*, that this act shall not extend to any cause when the balance found due shall have been actually paid and discharged by any executor, administrator or guardian."

The 39th, 41st, 57th and 58th sections of the Act of 24th February, 1834, relating to distribution amongst next of kin, are as follows:

SEC. 39. " * * * The administrator SHALL present to the Orphans' Court having jurisdiction of his accounts a statement of all demands against the estate, * * * and after deducting the amount thereof * * * make distribution of the residue under the direction of the Orphans' Court."

SEC. 41. "BEFORE any person shall be entitled to receive any share in the distribution as aforesaid, he SHALL give sufficient real or personal security, to be approved by the Orphans' Court, * * * with condition, that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or demand and of the costs and charges attending the recovery of the same."

SEC. 57. "Executors or administrators making, distributing, or paying, or delivering any legacies as aforesaid, shall not be liable for the assets so paid or distributed in respect to any claim or demand upon the decedent not previously made known to them, where security shall be taken as hereinbefore provided."

SEC. 58. "Executors and administrators may make distribution * * * without application as aforesaid to the Orphans' Court, upon such security as may be satisfactory to them, nevertheless at their own risk."

For appellant, *George Shiras, Jr., Esq.*

(1.) The appeal from the second decree was taken by way of precaution. The Act of October 13, 1840, had reference to the decree opening the confirmation of an account: *Rhode's Appeal*, 39 Pa. St., 186. The decree of confirmation was final and so should a decree setting it aside be considered.

(2.) The decree of confirmation operated as a ratification of the distribution contained in the account as effectively as though there had been a precedent decree of distribution: *Charlton's Appeal*, 7 Norris, 476.

(3.) Assuming that the decree of confirmation protected Mrs. Jones as respects distribution amongst next of kin, and that appellees could only be heard by bill of review to impeach it, there are four reasons why the bill should not have been entertained:

a. More than five years had elapsed since the date of the decree of confirmation: *Hendrickson's Estate*, 2 Pitts. R., 360.

b. The balance in Mrs. Jones' hands had been paid over: *Russell's Appeal*, 10 Casey, 258; *Craig's Appeal*, 2 W. N. C., 391; *Stewart's Appeal*, 5 Norris, 149.

c. The application was too late and not based on equitable grounds.

d. The petition does not disclose any error on the face of the decree, nor is after discovered evidence alleged.

Contra, *Messrs. D. T. Watson and H. Burgwin*.

(1.) The confirmation of an administration account is not conclusive of items of distribution contained in such account: *Lewis & Nelson's Appeal*, 67 Pa. St., 165; *Jones v. Lewis*, 6 Wr., 410; *Dutchess Kingston's Case*, 11 State Trials, 261; *Sergeant v. Ewing*, 12 C., 163; *Wheeler's Appeal*, 20 P. F. S., 428; *Keech v. Rinehart*, 10 Barr, 242; *Thomas v. Reigle*, 5 R., 266; *Torrence v. Torrence*, 3 P. F. S., 510; *Rittenhouse v. Levering*, 6 W. & S., 200; *Acke's Appeal*, 9 Harris, 320; *Yundt's Appeal*, 6 Barr, 36.

(2.) It was a condition precedent to the relief of the administratrix from liability that she should take refunding bonds from the distributees before paying them; and payment without such bonds was *devastavit*: *Musser v. Oliver*, 9 Harris, 362; *Swearingen v. Pendleton*, 4 S. & R., 394; Act 24th February, 1834, *supra*.

Opinion by TRUNKEY, J. Filed January, 2, 1882. ♦

Samuel Jones died in 1862, leaving a widow and five children. In 1870, the administratrix of his estate filed her account, which was confirmed by the court, showing that a large amount of personal property had come into her hands, out of which she had paid certain debts and liabilities, leaving a balance of \$22,567.70 which she had distributed to the widow and heirs. On November 8, 1852, Jones became surety upon a guardian's bond in the sum of \$20,000. By final decree in 1878, it was determined that the guardian had in his hands the sum of \$115,905.87 of the money of Mary C. Delafield, which sum he was ordered to pay to her. He was insolvent. In 1879, Mrs. Delafield obtained judgment against the administratrix of Samuel Jones, deceased, for the amount of the bond. The administratrix had no knowledge or notice of the existence of this debt until in the year 1877.

It is not pretended that Samuel Jones, if living, would have a defense, at law or in equity, against the payment of the debt; nor is it alleged that it is a debt which his administratrix was not bound to pay out of the moneys of the estate. But it is claimed that, under the Act of October 13, 1840, the confirmation of the account more than five years prior to the presenting of

the petition by Mrs. Delafield protects the administration, and, also, that the laches of the petitioner in bringing knowledge of the existence of the debt to the administratrix, relieves her from the consequences of the *devastavit*.

In passing it is sufficient to note that the blending of a distribution account with an administration account has often been condemned; an administration account, properly settled, shows nothing more than the balance due legatees, or distributees under the intestate laws, after payment of the debts and expenses of settling the estate. For the purposes of this case, it may be taken that the court approved the distribution set forth in the account.

As the petition, answer and pleadings, in proceedings in the Orphans' Court, are regarded as forming part of the decree, so is an administration account. The Act of October 13, 1840, not only gives the right of review to a party in interest upon proper showing, but fixes a limitation to petitions of review. It is none the less a limitation because it does not begin to run in favor of an accountant, who has perpetrated a fraud upon an interested party until discovery of the fraud by such party. Nothing in the facts of this case shows fraud, or other matter, which tolls the limitation. Whether the review is demanded for error in law apparent in the decree, or for new matter which has arisen after the decree, or for new proof that has come to light since the decree, the statutory limit applies. The error in blending the distribution and administration accounts appears in the decree. If a decree, or part thereof, be void, it would be so treated without reference to this statute.

The right of creditors to be paid out of a decedent's goods was recognized, both at common law and by statute, long before the right of succession was secured to his children and kindred. When a man dies in Pennsylvania, his estate, real and personal, comes within the jurisdiction of the Orphans' Court to be administered, first of all for the benefit of his creditors, and next for legatees, devisees and heirs: *Homer & Roberts v. Hasbrouck*, 5 Wr., 169. The personal estate is the primary fund for the payment of debts, but both personalty and realty are carefully hedged by statute against their appropriation to the prejudice of creditors. Before the kindred of a decedent shall be entitled to receive the proceeds of the sale of his real estate, they shall give refunding security as directed by section 45 of the Act of February 4, 1834, and Section 2 of the Act of May 23, 1871. Section 38 of the Act of 1834, P. L., 80, provides that no administrator shall be compelled to make distribution of the intestate's goods until after one year from

the granting of the letters. Sections 39 and 40 provide for distribution of assets, after deducting all demands which have been made known to the administrator, under the direction of the Orphans' Court, and section 41 declares that before any person shall be entitled to receive any share in the distribution, he shall give security to be approved by said court, "with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, he will refund the ratable part of such debt or demand, and of the costs and charges attending the recovery of the same." Where such security shall be taken the administrators "shall not be liable for the assets so paid or distributed, in respect to any claim or demand upon the decedent not previously made known to them:" Sec. 57. Administrators may make distribution, without application to said court, upon such security as may be satisfactory to them, nevertheless at their own risk: Sec. 58.

Refunding bonds are not required of a creditor to entitle him to receive his debt. Where a decree of distribution is made to and among creditors, though a creditor of record who had not given the administrator actual notice of his claim, was omitted, the administrator may safely pay the assets in accordance with the decree: *Cramp's Appeal*, 31 P. F. S., 90. The bond is not for the benefit of legatees, or distributees under the intestate laws. Where money has been paid by an administrator in pursuance of an order or decree of the Orphans' Court, a person entitled to a distributive share, or legacy, cannot charge the administrator personally for such money, nor is he entitled to a review as respects money so paid: *Russell's Administrator's Appeal*, 10 Cas., 258; *Stewart's Appeal*, 5 Nor., 149; *Charlton's Appeal*, 7 Id., 476; *Hendrickson's Estate*, 2 Pitts. R., 360.

Compliance by administrators with the Act of 1834 secures creditors of the estate in receiving their claims, notwithstanding payment of assets to legatees or distributees. "The object of the statute in requiring refunding bonds was to protect claims that might arise through mistaken or fraudulent settlements, as well as such that had not yet come to light. The only safe line of conduct for executors or administrators to follow is, to obey all the requisitions of the law. Governed by its directions, they will be protected by its shield. Disobeying its mandates, they must suffer its penalties:" *Musser v. Oliver*, 9 Harris, 362. It appeared in that case that Jacob Moltz, who was guardian of Barbara Mann, after she became of age in 1835, settled with and took her receipt in full; Moltz died in 1838; his administrators settled their ac-

count in 1843 and distributed and paid the balance to the widow and heirs; in 1844 a petition in behalf of said Barbara was presented to the Orphans' Court, praying that Moltz's administrators be cited to settle an account of their intestate as guardian, resulting in a decree that a balance was due her of \$1,972; and the administrators were fixed with a *devastavit*. Prior to 1834 there was a similar statute under which administrators who distributed the assets without taking refunding security were held personally liable to creditors. Among the cases recognizing such liability are *Thomas v. Riegel*, 5 R., 266, and *Pry's Appeal*, 8 Watts, 253. Whenever the question has arisen in this State it has been ruled that the payment of assets to distributees under the intestate laws, without taking security to refund as prescribed by statute, is so contrary to the duty of administrators as to render them personally liable to creditors to the extent of such payments. Their liability under these circumstances is fixed by the plain terms of the statute. The security required is specially for protection of creditors whose claims are unknown by the administrators; and before they were authorized to take such security, there was no mode by which they could distribute to heirs and relieve themselves of liability to such creditors.

It is unnecessary to consider whether the confirmation of the account was an adjudication of the distribution. Conceding that it was, the decree must be interpreted in the light of the statute. There is no conflict, no inconsistency between the statute and the decree. Had the administratrix taken security, approved by the court, her liability would have ceased. She paid without security, and it was at her own risk. It would be absurd to infer from anything in the account and its confirmation, that the court directed the money to be paid without security and in violation of law. If the meaning of the decree were doubtful, which is not, it should be understood in the sense which is lawful, not that which is wholly outside the power of the court. The decree merely directed the distribution; the law declared the terms upon which the distributees were entitled to receive the money and the administratrix could pay it without risk.

The petitioner's judgment is conclusive of the legality of the claim against the estate. No statute of limitation bars it. No presumption of payment arises from lapse of time, or other thing. The law secures to creditors as full right to recover their claims against the estate of a decedent, as they would have if he were living. If the administratrix still had the assets

in her hands, her duty to pay could not be denied. It is no fault of the petitioner that the assets have been distributed without refunding bonds. No act or laches on her part, exempts the administratrix from the consequences of the *devastavit*. Long established principles impel us to the conclusion reached by the court below. It may be a hardship upon the widow and children of the decedent to pay this debt, but it is the inevitable result of his executing the bond, the guardian being insolvent.

In an action at law against the administratrix to charge her personally with the debt, the admitted facts would be decisive. The better place to enforce the right is in the Orphans' Court, which has jurisdiction of the accounts of administrators, and of the estates of decedents for creditors. It is well settled that a creditor may enforce payment of a debt owing by decedent's estate in the Orphans' Court.

Although we are of opinion that the petition was too late for a review of the decree confirming the account, yet without review the petitioner's right that the administratrix be charged with the assets improperly distributed, to the amount of her judgment, is clear, and the mode of doing it, which was adopted, reached the same result as if the order had been made upon the original petition. That form of procedure prejudiced no one's rights and is no cause for reversal.

Two appeals were taken, one to the decree ordering a hearing, and the other to the final decree. In the view we have taken, the case has been considered upon the appeal to the final decree, and this would have been so had we thought the review was rightly granted. The Act of 1840, P. L., 1, gives "like right of appeal to the Supreme Court as in other cases, except that the appeal shall be taken under the provisions of this act within one year after the decree made on the petition of review." The granting of a rehearing of so much of an account as is alleged to be error is preliminary to the inquiry respecting such errors, and if the decree be against the petitioner, the original decree stands as it did before the petition and during the time of the rehearing. If the order for a rehearing be called a decree, it is merely interlocutory. The refusal to grant a rehearing is final against the petitioner; but if a rehearing be granted the questions therein are heard and considered, and then the decree is made upon the petition, from which the aggrieved party may appeal within the time limited. It is not the intendment of the statute to allow an appeal to an interlocutory decree, or order.

Decree affirmed and appeal dismissed at the costs of the appellant.

RIDDLE et ux., Defendants Below, v. HALL, for use.

A mortgage executed by a married woman in consideration of an agreement to stifle or desist from a prosecution for a misdemeanor against her husband or son is invalid, the consideration being illegal; but that the consideration was an agreement must be found.

If a mortgagee, in order to procure the execution of the mortgage in suit by a married woman, used language with the intention of assuring her that criminal proceedings against her husband or son would be stopped by reason of its execution, and she relied on that assurance and in consideration thereof did give it, it is for the jury to find whether that did not enter into and form a part of the agreement under which the mortgage was given.

If a mortgagee represented to a married woman that, if she executed the mortgage in suit, he had no doubt that a criminal prosecution against her husband and son would be abandoned, and thereby intended to deceive and did deceive her and relying thereon she executed the mortgage, and such prosecutions were thereafter instituted, she was released from its payment.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action on a mortgage, given by George R. Riddle and Mary A., his wife, on property of the said Mary to James W. Hall, for the use of the "Franklin Savings Bank," an unincorporated company. Through the abuse of their trust by George R. Riddle, the president, and James H. his son, the cashier, the bank failed. Criminal proceedings were begun against the son, and were threatened against the father. An effort was made by the stockholders to raise by subscription moneys to pay the bank's liabilities. Mrs. Mary A. Riddle who was a stockholder, made a subscription to that object, and at first agreed to secure its payment by a mortgage on her property, if that would stop the prosecutions. She subsequently refused to execute a mortgage unless the prosecutions were first "settled in black and white." These facts are more fully stated in the opinion.

A committee of the bank, consisting of Mr. Hall, the defendant in error, and Dr. Mowry, the brother-in-law of George R. Riddle, called on Mrs. Riddle to procure her assent to secure the subscription made by her. The defense arises from what occurred on this occasion. It was claimed that the mortgage in suit, subsequently executed by Mrs. Riddle was void, because it was given to suppress a criminal prosecution, and was procured by duress.

Mrs. Riddle's statement of the conversation had with Messrs Hall and Mowry and its effect upon her is as follows:

"Dr. Mowry and Mr. Hall came to see me, and when they came to see me I thought the matter all over, and I had made up my mind, fully determined, to not sign that mortgage unless they would give me a writing in black

and white to show that I would be secured from those persons ever going on with the prosecution against my husband and son, and Dr. Mowry talked to me and tried to persuade me to believe that those men would never go on with the trial; that everything would be settled quietly, and he talked a good while to me, but it hadn't the least effect on me; my mind was fully made up. Mr. Hall said: 'Mrs. Riddle, it is my turn now to talk to you,' said he; 'I am almost certain those men will never go on with the prosecution if you sign that mortgage, but,' says he, 'I would not guarantee that they would not.' Said he, very determinedly to me, 'If you don't sign that mortgage it will be the worst thing you ever done.' That frightened me, and I signed it against my own will and judgment. Then I was frightened. I knew Mr. Hall knew all about the circumstances, and I did not know if I didn't sign that what the result would be, and I was frightened.

Q. If it had not been represented to you that the signing of this mortgage would result in releasing your husband and son, state whether or not you would have signed it?

A. I would have signed it if I had had a writing in black and white to show, to make me secure that they never would have gone on with the prosecution.

Q. Would you have signed it if you had known the prosecutions were to go on anyhow?

A. No, sir. I was willing to do what I could to help the bank. All that Mr. Hall or Dr. Mowry ever said to me to try to persuade me to sign it never had the least effect on me, only that word, 'If you don't do that it will be the worst thing you ever done.' That was the only word that ever made me sign it."

She did not tell them whether she had changed her mind or not, but her son George testified that she determined that night to sign a mortgage. The mortgage was written by her husband and executed on the following day.

The second, third and fourth assignments of error were to refusals of points of defendant, and the fifth and sixth to the withdrawal of the case from the jury.

For plaintiffs in error, *Messrs. Hampton & Dalzell and S. H. Geyer.*

Contra, Messrs. Schoyer & McMurray.

Opinion by MERCUR, J. Filed January 2, 1882.

Ex turpi contractu non oritur actio, is a well recognized maxim of common law. In this case the claim is to enforce a mortgage executed by husband and wife against the real estate of the wife. It is undoubted law that a married

woman may, by joining with her husband, make a valid mortgage of her separate estate to secure his debt or that of a third person. Conceding the general power, the defense alleges the turpitude of the consideration, and the undue influence exercised on the wife in procuring the execution of the mortgage. The court being of the opinion that the evidence was insufficient to submit to the jury, gave them peremptory instructions to find for the plaintiff below.

It is elementary law that an agreement in consideration of stifling or compounding a criminal prosecution or proceedings for a felony or a misdemeanor of a public nature, is void: *Chitty on Contracts*, *674. An action will not lie on a bond when part of the consideration is an agreement not to prosecute for malicious mischief: *Id.*, in note citing *Cameron v. McFarland*, 2 Car. Law Rep., 414. So a mortgage given in consideration of an agreement that an indictment found for obtaining mules by false pretenses, should be dismissed and the prosecutor not appear, was held void: *Kimbrough v. Lane*, Court of Appeal of Ky., Vol. 15 (N. S.), *American Law Register*, 389. It was held, in *Harris v. Carmody*, by the Supreme Court of Mass., Vol. 20, *Id.*, 663, that a note and mortgage given by a father to the plaintiff, under threats to prosecute and imprison his son for an alleged forgery of the father's name, may be avoided by the father on the ground of duress. Where any part of the consideration of a promissory note is a promise by the payees to abstain from prosecuting the son of the maker for forgery, the note is void: *National Bank of Oxford v. Kirk*, 9 Norris, 49.

The Franklin Savings Bank was not incorporated. Each of the plaintiffs in error and their two sons, James H. Riddle and George D. Riddle, were stockholders therein. George R., the husband of Mrs. Riddle, was the president and James H., her son, was the cashier thereof. Through the improper use of the funds of the bank by these officers, it failed. On complaint of the directors of the bank, an indictment had been found against her son James for embezzlement, and a criminal prosecution was also threatened by them against her husband. A meeting of the stockholders was afterwards held, at which subscriptions were made to raise a fund for the payment of depositors or creditors of the bank. George D. Riddle at first subscribed \$2,000, and afterwards increased it to \$4,000. He also subscribed \$2,000 in the name of his mother. He testified substantially that his increased subscription, and the one in the name of his mother, were made at the request

of Hall, the defendant in error, who was a director of the bank, and on his statement that he believed and was satisfied it would stop the prosecutions if the witness would get his mother to pay the sums subscribed. Without authority from his mother he subscribed in her name, with that understanding, and was to so inform her. On his notifying her she answered if it would stop the criminal prosecutions she would agree to it.

Hall and Dr. Mowry were appointed by the bank a committee to call on Mrs. Riddle to induce her to execute the mortgage for the \$6,000. George D. accompanied them. He testifies that she said to them that she "would not sign the mortgage until the criminal matters were fixed in black and white." That Dr. Mowry told her "he was satisfied this would settle the whole criminal trouble," and Hall said: "I firmly believe if you would sign this mortgage that it will result in settling all this criminal trouble, and if you do not sign it, it will be the worst thing you ever did;" thereupon she agreed to execute it and did so the next day. That she agreed to the subscription with the understanding that they would not appear against her son nor prosecute her husband. The evidence of Mrs. Riddle substantially corroborates that of the son; but she states some other facts. She says while Hall said he would not guarantee that those men would not go on with the prosecution as he had no right to, yet he was almost certain they would not, and that on his telling her if she did not sign the mortgage it would be the worst thing she ever did, "that frightened me and I signed it against my own will and judgment." She further testified that she signed it for the purpose of saving her son and her husband, and "would not have signed if she had known the prosecutions were to go on anyhow." She expected the prosecutions would go on if she did not sign, but would not if she did sign.

Hall testified in chief, that at the interview referred to with Mrs. Riddle, the matter of the criminal prosecutions was introduced and that he said to her he thought if the subscriptions made were carried out in good faith it would end these troubles, although he had no authority from any person to say so. On cross-examination he testified, "we talked about the criminal prosecution and it was generally including the whole, that all those difficulties, prosecutions, whatever they might be, that they would end." He further told her if she executed the mortgage or carried out the subscription that would be the end of the matter. It was proved that after the execution of the

mortgage a *nolle prosequi* was entered in the prosecution against James, and on complaint of the directors of the bank an indictment was found against him and his father, the son and husband of Mrs. Riddle, for conspiracy, on which they were tried, convicted and sentenced.

Some of the facts narrated are denied by the witnesses of the defendant in error; but the credibility of the witnesses and the weight of the evidence are questions for the jury. The main complaint is that the jury was not permitted to pass on the evidence.

It is an undoubted fact that Mrs. Riddle was induced to give this mortgage on her land to secure the payment of subscriptions for which she was not legally bound to pay anything. There is certainly some evidence that the operative inducement and controlling consideration in her mind were to stop and prevent the prosecutions begun and threatened against her son and her husband. Her confidence and assurance that such would be the effect of giving the mortgage were derived from the two persons who acted as a committee from the bank. To such an extent did Hall assume power and authority to stipulate in regard to all the conditions on which she should give a mortgage that it was given to him. He it was, that she testified, used the strongest assurance that on her giving it all prosecutions would be stopped, and who frightened her by suggesting alarming consequences if she refused.

A mortgagee is not the purchaser of an estate. He is simply a lien creditor, holding the mortgage as security for the payment of the bond therein recited. This mortgage was assigned by Hall to the trustee of the bank. Although it was originally designed for the benefit of the latter; yet for all purposes of defense connected with the giving of the mortgage, the bank stands on no higher ground than Hall occupied. Not only is he the legal party of record; but when the bank seeks to enforce a contract made by its agent, for its benefit, it is bound by the acts of the agent which affect the validity of the contract in the making thereof: *Swope v. Jefferson Fire Ins. Co.*, 8 W. N., 481.

If this mortgage was executed in consideration of an agreement to stifle or desist from a criminal prosecution against the husband and son of Mrs. Riddle, or against either of them, or if that was a part of the consideration, it was an illegal consideration which destroys the validity of the mortgage. To constitute a defense on this ground the agreement must be found. Whether there was such in this case is to be decided by a consideration of all the facts and circumstances given in evidence. The fact that

Mrs. Riddle was under no legal liability to give the mortgage or to pay the debt therein referred to, and the reasons urged by Hall and Mowry to induce her to give it, are proper to consider. The inquiry need not stop with a critical view of the words used by Hall and Mowry; but due regard should be given to the meaning they were intended to convey, and reasonably did convey. If they used the language stated with the intention of thereby assuring Mrs. Riddle that all criminal proceedings would be stopped if she would give the mortgage, and she relying on that assurance and in consideration thereof, did give it, the question is for the jury to find whether that did not enter into and form a part of the agreement under which the mortgage was given: *National Bank of Oxford v. Kirk, supra*. Was or was not it understood by both parties to the mortgage that a part of the consideration was that the criminal proceedings should be stopped? If it was, it matters not whether they were stopped or prosecuted to judgment. The agreement itself vitiated the mortgage as it rested on an illegal consideration.

If, however, neither Hall nor Mowry did agree that no criminal proceedings should be had against either her husband or her son; yet if their allegations and representations relating thereto were intended to deceive and did deceive Mrs. Riddle, and she relying on their statements that none would be had, and by reason thereof did execute the mortgage, the subsequent proceedings against her husband and son released her from its payment.

It was said by Mr. Chief Justice GIBSON, in *Trevall v. Fitch*, 5 Whar., 325: "It is an elementary principle that an agreement founded in a false conception is a nullity in respect to the party who misconceived, because he assented to it, not absolutely, but on a condition not verified by the event."

In the present case the rights of no third persons have intervened, so as to exclude any defense Mrs. Riddle may have arising from the facts and circumstances under which the mortgage was given.

We discover no sufficient reason for rejecting the evidence covered by the first assignment; but substantially it was afterwards received, so no harm resulted from the first rejection. We discover no error in the third assignment; nor under the evidence do we see error in refusing to affirm the point covered by the fourth assignment. The fifth and sixth assignments are sustained, and the second, so far as it is in conflict with this opinion.

Judgment reversed and venire facias de novo awarded.

APPEAL OF JOHN ROBB et al.

The rule of policy which disqualifies a widow from testifying against the interest of her deceased husband's estate is confined to matters of a confidential nature, of which she acquired knowledge by reason of her marital relation.

On a claim for wages against a decedent's estate, under an alleged express contract of hiring, the decedent's widow is a competent witness, on behalf of the claimant, to prove the contract.

Appeal of John Robb et al. from a decree of the Orphans' Court of Allegheny county, dismissing their exceptions to the auditor's report on the account of Jane Robb, executrix of David Robb, deceased, and confirming the report.

Before the auditor, Mary Stein, a sister-in-law of the decedent, presented a claim for wages as domestic servant under an alleged express contract of hiring entered into with her by the decedent. To prove the contract, she called as the only witness Jane Robb, widow and executrix of the decedent. Her competency as a witness was denied by the appellants. The auditor overruled the objection. Her testimony is recited in the opinion of the Supreme Court, *infra*. The auditor allowed the claim, and awarded to Mrs. Stein the entire balance for distribution, viz., \$1,466.70.

Exceptions filed by John Robb et al. were after argument, dismissed by the court (HAWKINS, P. J.), and the report confirmed, whereupon the exceptants took this appeal, assigning for error, *inter alia*, the overruling of their exception to the admission of the decedent's widow to testify in support of the claim.

For appellants, *Frank Whitesell, Esq.*

Contra, Hon. Thos. M. Marshall.

Opinion by STERRETT, J. Filed October 31, 1881.

It is contended that on grounds of public policy the widow of the decedent was incompetent to testify to the contract on which appellee's claim for wages is based; that the disqualification incident to coverture continued after the death of her husband, and is not limited to what occurred in their confidential intercourse, but extends to all facts and transactions which came to her knowledge during their marital relations. While the principle, thus broadly stated has sometimes been recognized, the better and more generally received opinion is that the disqualification is restricted to communications of a confidential nature and does not embrace ordinary business transactions and conversations in which others have participated. This appears to be the principle recognized in our own cases: *Cornell v. Vanartsdalen*, 4 Barr,

364; *Peiffer v. Lytle*, 8 P. F. Smith, 386. The Orphans' Court adhering to this view of the law, permitted the widow to testify to conversations between her husband, herself and the appellee, which resulted in a contract of hiring, in pursuance of which the latter entered the service of Mr. Robb in October 1869, and continued therein until his death on September 10, 1877. These conversations, as shown by the testimony, are not, in any proper sense of the term, confidential communications, and there was therefore no error in permitting the witness to testify.

From the evidence properly before him the learned judge found, among other things, that when the appellee first entered the service of the decedent, he agreed to pay her three dollars per week, "but subsequently increased her wages to three dollars and a half per week. He paid her nothing and no demand was made. The matter, however, was discussed and the contract was distinctly recognized as in existence. She did not need the money and he was allowed to have the use of it." In the absence of any exception to the finding of these or any other facts in the case it must be conclusively presumed that the appellee entered the service of the decedent under a contract for wages at \$3, which was shortly afterwards increased to \$3.50 per week; that while the existence of the contract relation was distinctly recognized she neither demanded nor received any of her wages, but, for the reason stated, permitted the same to remain in the hands of her employer for his use and benefit. These facts necessarily led to the conclusion that the appellee's claim against the estate exceeded the net balance for distribution, and in the absence of any other valid claim the whole fund was awarded to her, on account. In other words the decree is based upon and fully sustained by the facts distinctly found by the auditing judge and not excepted to or assigned for error. The findings of fact, upon which decrees, either in the Orphans' Court or Court of Common Pleas, are based, are not reviewable here unless they are specially assigned as error.

Aside from the evidence of an express contract which was found by the court, the testimony, returned with the record but not printed in full by appellants, clearly shows that the services rendered by the appellee from October, 1869, to the death of Mr. Robb, were reasonably worth at least \$3.50 per week. It was shown that in addition to her general household duties, she did all the family washing, attended to the cows, and at times cleaned the stable, and rendered other services outside the ordinary work of a female domestic. The lowest estimate placed

on the value of her services by any of the witnesses is \$3.50 per week.

The complaint in the second assignment is that, "The court erred in overruling the defense of the statute of limitations." If in point of fact this was done it would be error. Upon the facts of the case, as disclosed by the testimony, the statute of limitations was undoubtedly a bar to so much of appellee's claim as was due and payable more than six years prior to the death of the intestate. In other words, her right to recover was limited to the six years' service immediately preceding his death with the interest thereon from the time her weekly wages were due and payable. The court found that shortly after the original contract was made her wages were increased to \$3.50. At that rate her claim, including interest, would be about one hundred dollars more than the net balance for distribution. This was doubtless the reason why the court took no notice of the defense under the statute of limitations. It was apparent that her claim, for that portion of her services not barred by the statute, computed according to the terms of the contract, would exceed the fund for distribution, and therefore the question as to the bar of the statute became wholly immaterial.

There is nothing in any of the assignments of error that requires further notice.

Decree affirmed and appeal dismissed at the costs of the appellants.

Orphans' Court.

In Re Estate of MARGARET BARNHILL, Dec'd.

B. bequeathed to S., in consideration of his "great care and attention," forty shares bank stock, for which she held "the obligation of" T. or "their equivalent." T. sold the stock before the date of will, and suit was brought against him after her death for the value of the stock. *Held*, that "their equivalent" was to be ascertained as of the death of testatrix and was a general legacy.

Margaret Barnhill died July 5, 1880, testate, and having appointed Wm. K. Gillespie, the present accountant, executor of her will. The account now before the court shows a balance of \$11,771.98 for distribution.

By her will Mrs. Barnhill made the following bequest:

Item IV. I direct that my estate, which consists of * * * receipt of George Thompson for forty shares capital stock of the Iron City National Bank of Pittsburgh * * * shall be disposed of in the following manner:

Fourth. I give and bequeath to Charles A. Scott, in consideration of his great kindness and

attention to me, forty shares capital stock of the Iron City Bank of Pittsburgh, for which I hold the obligation of George Thompson, or their equivalent. The obligation here referred to, was in Mrs. Barnhill's possession when she died, and is as follows:

"Received, Pittsburgh, September 21, 1878, of Mrs. Barnhill, forty (40) shares Iron City National Bank stock, which is to be returned to her or its value in money.

"GEORGE THOMPSON."

This stock was transferred to George Thompson on the books of the bank, September 21, 1878, and was sold by him on January 31, 1879, at \$76 per share.

The will of Mrs. Barnhill is dated July 2, 1880. The par value of Iron City National Bank stock per share is \$50. Its market value at the date of the sale, made by George Thompson, January, 1879, was \$76. Its value on the books of the bank at the same date was \$91. Its market value in March, 1880, was \$99. Its value on the books of the bank at the same date was \$91. No sales seem to have been made from this date until February, 1881, when a sale at auction was made at \$109.75. This stock stands in the first-class, is seldom in the market, and certainly did not depreciate in value from March, 1880, onward.

Subject to objection, as respected competency and relevancy, George Thompson was sworn and testified, at the audit, that Mrs. Barnhill had loaned her stock to be used by him as collateral security in borrowing money on his note; that he had so used it, and being unable to pay his note at maturity, had, after consultation with her, and with her approbation, sold her stock at \$76 per share, and appropriated so much of the proceeds as were necessary to that purpose.

Mr. Thompson did not return the stock, nor its value in money, to Mrs. Barnhill. Since her death he has paid her administrator \$1,000, on account, and, having refused to pay the balance, suit has been brought against him, which is now pending, for the present value in money of the stock (say \$110).

A question was raised on these facts, what was the "equivalent" of the stock for which Mrs. Barnhill held George Thompson's "obligation?"

Opinion by HAWKINS, P. J. Filed November 30, 1881.

In order to entitle Charles A. Scott to the alternative legacy given him by this testatrix, it was necessary he should show as matter of fact (1) that the forty shares of Iron City National Bank stock for which she held the obligation of George Thompson, did not constitute part of the assets in the hands of her executor; and, having shown this, (2) what was the "equiva-

lent" of this stock at testatrix' death? These facts having been established, every extrinsic fact suggested by the terms of the bequest as being necessary was shown, and the only conclusion that could be drawn was that by the expression "their equivalent" was meant the value of the forty shares of stock at testatrix' death: *Selwood v. Mildway*, 3 Ves., Jr., 306; *Lindgren v. Lindgren*, 9 Beav., 358; *King v. Wright*, 14 Sim., 400. The manifest intention of Mrs. Barnhill, apparent on the face of her will, was to provide for Charles A. Scott in any event, "in consideration of his great kindness and attention" to her. She looked forward to the return of the forty shares of stock for which she held "the obligation of George Thompson," and in that expectation made them the subject of a specific bequest; but in the event that they should not be returned, gave him the "equivalent" of the stock. The contingency which she contemplated could not be determined before her death, and the ascertainment of the "equivalent" had reference therefore to that time. In other words, she intended that her will should speak from her death in accordance with the general rule.

The alternative bequest, unlike that of the stock, had nothing specific about it. It was not a bequest of "the obligation of George Thompson." It was not even a gift of the amount which might be realized from that obligation nor the proceeds of the stock itself. It was simply intended as a substitute for the stock itself in case it should not be returned. It was to be the equal in value, but not necessarily derived from the stock. The stock itself might never be returned and nothing be recovered from George Thompson, but if not, "in consideration of his great kindness and attention" to testatrix, this legatee should have the "equivalent" of the stock itself. Obviously therefore the state of accounts between George Thompson and Mrs. Barnhill had nothing whatever to do with the ascertainment of the "equivalent;" and the evidence adduced with that view was incompetent. There is no latent ambiguity nor mistake in the will. It involves a single question of construction which may be solved by the application of plain principles.

It follows that the "equivalent" of the stock is to be ascertained as of the death of testatrix, and is payable out of her general personal estate: *Selwood v. Mildway*; *Lindgren v. Lindgren*, *supra*; *Mullin v. Smith*, 1 Drew & Son, 204.

For accountant and Charles A. Scott, *Chas. W. Collier, Esq.*

For guardian, *W. D. Porter, Esq.*

For legatees, *Jacob H. Miller, Esq.*

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PITTSBURGH, PA., JANUARY 18, 1882.

THE SUPREME COURT.

A Summary of the Work Done During the Years 1880-1881.

The following carefully prepared tables show the work done by our Supreme Court, and the justices individually during the years 1880 and 1881. The judgments entered on the first Monday of January, 1881, are included in the number of judgments entered in the year 1880, as the cases decided on that day were heard in that year, and, *mutatis mutandis*, the same statement applies to those entered on the first Monday and Tuesday of January, 1882. The first table show:

JUDGMENTS ENTERED.	1880	1881
Affirming lower courts.....	487	584
Reversed.....	55	81
Reversed and sent back for further proceedings.....	65	120
Total number of judgments.....	611	761
Percentage of reversals.....	.24	.30

The following shows the number of *Per Curiam* opinions filed, nearly all of which were written by the Chief Justice, and the number of opinions written by each of the Justices:

OPINIONS WRITTEN BY	1880	1881
(Per Curiam).....	364	438
Chief Justice Sharswood.....	14	10
Mr. Justice Mercur.....	37	54
" " Gordon.....	41	56
" " Paxson.....	20	53
" " Trunkney.....	54	54
" " Sterrett.....	55	53
" " Green.....	26*	43

Total number written..... 611 761

*Mr. Justice GREEN filed his first opinion on May 3.

The whole number of cases dissented in 1880 was 21; in 1881, 29. Mr. Justice TRUNKNEY filed one dissenting opinion in 1880, and five in 1881. Mr. Justice MERCUR filed one in 1881, as did also Mr. Justice GREEN. The following tables show the number of single dissents by each Justice, and also the number of dissents by two or more:

DISSENTED SINGLY.	1880	1881
Chief Justice Sharswood.....	2	3
Mr. Justice Mercur.....	1	2
" " Gordon.....	2	2
" " Paxson.....	3	—
" " Trunkney.....	1	2
" " Sterrett.....	1	1
" " Green.....	—	1
Totals.....	10	11

TWO OR MORE DISSENTING.	1880	1881
Sharswood, C. J., and Mercur, J.....	—	1
Sharswood, C. J., and Gordon, J.....	—	1
Sharswood, C. J., and Paxson, J.....	1	—
Sharswood, C. J., and Trunkney, J.....	1	1
Sharswood, C. J., Gordon and Trunkney, JJ.,	—	1
Sharswood, C. J., Paxson and Trunkney, JJ.,	—	1
Sharswood, C. J., Trunkney and Sterrett, JJ.,	—	2
Sharswood, C. J., Trunkney and Green, JJ.,	—	1
Mercur and Gordon, JJ.....	—	1
Mercur and Sterrett, JJ.....	2	1
Mercur, Gordon and Green, JJ.....	—	2
Gordon and Trunkney, JJ.....	2	1
Gordon and Sterrett, JJ.....	1	1
Gordon, Trunkney and Sterrett, JJ.....	2	1
Gordon, Trunkney and Green, JJ.....	—	1
Trunkney and Sterrett, JJ.....	1	2
Sterrett and Green, JJ.....	1	—
Totals.....	11	18

Supreme Court, Penn'a.

JAMES FULLER'S APPEAL.

F. made a contract with B. for the sale of a silver claim situated in Montana, with right of rescission in B. within a year, and thereupon repayment by F. of the consideration. B. mortgaged his homestead to raise money with which to pay the consideration, and paid it. B. died and F. became guardian of B.'s children, and agreed to rescind the contract within the year. The mortgage was the only unpaid debt of B., and the administrator had settled a final account. *Held*, on settlement of the guardian's account, that the Orphans' Court had no jurisdiction to surcharge the guardian with the mortgage.

Appeal from the decree of the Orphans' Court of Allegheny county.

On November 29, 1875, Dr. Fuller agreed in writing with R. D. Beatty to sell him "four and one-half (4½) tenths of the Franklin silver in Deer Lodge county, and Territory of Montana," in consideration of the payment by said Beatty of the sum of \$10,000, provided that, "if the said party of the first part, R. D. Beatty, is dissatisfied with his purchase of the said four and one-half-tenths of the said Franklin Silver Lodge at the expiration of one year from this date, the said James Fuller and Bella C., his wife, agree to pay back the full amount, ten thousand dollars (\$10,000), with interest on the same." Mr. Beatty raised by mortgage on his homestead and paid therewith to Dr. Fuller the ten thousand dollars mentioned in this agreement, and died within one year after the date of the agreement, without having expressed any dissatisfaction with the purchase. The widow and sister of Mr. Beatty testified, and they were not contradicted, that for two or three years prior to his death he was not fit to transact business, and that Dr. Fuller knew the fact. At the instance of the widow, Dr. Fuller, within a few days

after Mr. Beatty's death, assumed the payment of the mortgage on the homestead, and so represented himself, both to the widow and the administrator uniformly, until in 1879, domestic difficulties arose in his family. He had in the meantime been appointed guardian of decedent's minor children. He never tendered a transfer of the mining stock and there is no reference to it in the present account. He alleges that he paid \$20,000 for the property; that it is worth over that amount now, and that he has been taking care of it. The court below surcharged him with the balance of the mortgage, HAWKINS, P. J., filing the following opinion:

"The fact that Dr. Fuller assumed the payment of the Beatty mortgage, aside from other circumstances of the case, were such as to require the exercise of the right of rescission of the purchase of the mining property as provided by the contract. The contract itself was one which in Mr. Beatty's mental and financial condition should not have been made. And the property purchased was unsuited in character and location to the situation of his children. It was distant, in a new country, and necessarily of uncertain value and has been, so far, unproductive. The children were so young as to be unable to support themselves and had inadequate means. The amount invested in this mining property would, in the hands of the guardian here, have assured, at least, their present maintenance. Every consideration then, of justice and prudence, looked to an election to accept the cash invested instead of the mining property; and equity will regard that as done which ought to have been done.

"The evidence does not show that there are any unpaid debts of Robley D. Beatty, other than the mortgage in question. If not, there was no necessity of the intervention of the administrator. Dr. Fuller's was the hand which ought to have paid, and his was the duty to see that the mortgage was satisfied. It must be presumed that he had the money in his hands as guardian for the purpose of payment. As he has not procured the satisfaction of the mortgage he has neglected his duty and must place his successor in the position to do what he should have done."

For appellant, *Geo. Shiras, Jr.*
Contra, Bruce & Negley.

Opinion by GORDON, J. Filed November 7, 1881.

We cannot agree with the court below in its surcharge of the account of the appellant, as guardian of the minor children of Robley D. Beatty, in the sum of \$10,000, the balance of the

Cassidy mortgage. He was charged with this amount on the ground, that, after Beatty's death, he assumed in some conversations which he at different times had with the widow and administrator to pay this mortgage.

But conceding this assumption to have been clear and distinct, and not within the prohibition of the Act of the 28th of April, 1855, yet we cannot see how a contract of this kind can be enforced by a decree of the Orphans' Court. There is in this no money or other assets of the wards; it is at best but an agreement with the representatives of Beatty's estate, which must be enforced by ordinary process in the Common Pleas.

But there is an alleged consideration back of this assumption; were it not so the undertaking to pay the mortgage would be altogether worthless. That consideration arises from the agreement between the appellant and Robley D. Beatty of the 29th of November, 1875, by which the appellant agreed to sell to Beatty four and one-half-tenths of the "Franklin Silver Lodge in Deer Lodge county, Territory of Montana," and on which Beatty paid to the appellant \$10,000.

By the same paper it was agreed that if Beatty became dissatisfied with his purchase, the appellant was within one year from the date of the agreement to refund the money so paid by Beatty. It is now alleged that Dr. Fuller, the appellant, somehow became liable to repay this money, and thus arises the consideration for the assumption of the mortgage. Let all this be admitted, and we have but an agreement by Fuller to pay the money due on his contract in a particular manner; that is to say, by the payment of the mortgage which Beatty executed in order to raise the money paid to Fuller. But how was this contract to be enforced? Certainly not by a decree of the Orphans' Court which necessarily presupposes that this claim had passed to the guardian as part of the liquidated assets of his wards, nor even by process in equity to compel him to pay the mortgage, but by an action at law brought by the representatives of Beatty's estate for the recovery of the damages resulting from a breach of the contract.

We think, therefore, as to this item, the Orphans' Court exceeded its jurisdiction in attempting to try and dispose of a question involving, at most, only the breach of a contract made by the appellant with the decedent in his lifetime, and which must of necessity pass to and be disposed of by the representatives of Beatty's estate.

The remaining exceptions are dismissed; for

though we are not without doubt as to some other of the charges against the appellant, we cannot certainly say that the court erred in allowing them.

The decree of the court is now reversed and set aside as to the surcharge in the appellant's account of ten thousand dollars "on account of mortgage on homestead," and confirmed as to the balance of said account. And it is further ordered that the appellees pay the costs of this appeal.

STERRETT, J., dissents.

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McDONALD et al., Plaintiffs Below, v. SIM-COX et al.

Although a judgment recovered before a justice be irregular, yet if he has jurisdiction of the subject-matter, the only redress of the defendants therein is by *certiorari*. Suit was brought by one King against "H. Stewart & Co.," a firm of which the plaintiffs in error, non residents of the county in which plaintiff lived, were members before a justice, and an attachment issued under Section 26, Act 12th of July, 1842, P. L., 345. Their property was attached, and on the return day a summons issued, returnable in three days instead of five, as required by the Act of 1810 (Purd., 850, pl., 40). The defendants not appearing, judgment was entered against them, and the property sold at constable's sale to King, the attaching creditor, who sold it to the defendants in error. In an action of trover and conversion, brought by the plaintiffs in error against them, *held*,

- (1.) That jurisdiction over the property having been acquired by virtue of the attachment, irregularity in the subsequent proceedings could be corrected by *certiorari* only, and not in a collateral proceeding.
- (2.) The property sold being firm property, a valid title passed by the sale, although the names of all the persons composing the firm were not set forth in the original suit.
- (3.) The interest of Stewart, one of the partners in the property, having been divested by the sale, the other partners could not unite his name with theirs and recover in an action of trover. A joint action in *tort* cannot be maintained when some of the plaintiffs are shown to have no right to recover.

Error to the Court of Common Pleas of Venango county. The opinion states the facts:

Opinion by MERCUR, J. Filed November 21, 1881.

This was an action of trover to recover for chattels, formerly the property of the plaintiffs, sold by a constable on an execution. It issued on a judgment recovered against them, or some of them, in favor of one King. He bought the property and afterwards sold it to the defendants. The plaintiffs now question the effect of that judgment, and attack its validity.

It is settled law that the regularity of a judgment of a court having jurisdiction of the subject-matter cannot be questioned in a collateral proceeding. Although a judgment recovered before a justice of the peace be irregular, yet

if he has jurisdiction of the subject-matter, the only redress of the defendants therein is by *certiorari*. If they acquiesce therein by taking no steps to reverse it they thereby make it as good and valid as if all the prerequisites of the law had been observed. A title to property acquired under judgment and execution cannot be defeated by proving some defect in the original process. The judgment of every court pronounced on a subject within its jurisdiction is conclusive and binding on all other courts, except those only before which it comes by appeal, *certiorari* or writ of error: *Tarbox v. Hays*, 6 Watts, 398; *Haner's Appeal*, 5 W. & S., 473; *Sloan v. McKinstry*, 6 Harris, 120; *Billings & May v. Russell*, 11 Id., 189.

The judgment in question was obtained on proceedings commenced by attachment under the 26th Section of the Act of 12th July, 1842, P. L., 345, against H. Stewart & Co. as non-residents of the county, having personal property therein. This section provides in case no *capias* can issue under Section 24 of the Act, "and the defendant shall reside out of the county he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from the date thereof which shall be served at least two days before the time of appearance mentioned therein." Thus this section authorizes either form of writ to issue at the option of the plaintiff. The day of return and time of service is the same for each. Whichever writ is issued constitutes the original process. If it be summons no valid judgment can be rendered without service or appearance by defendant. If it be by attachment a valid judgment *in rem* may be obtained. King made the necessary affidavit and executed the required bond. The claim was for goods sold and delivered. No fact was shown which authorized a *capias* to issue. The justice had undoubted jurisdiction of the cause of action. The attachment was made returnable and served according to the requirement of the statute. The property in question was attached and due return thereof was made on the writ. Summons then issued which was returned, defendant not found in the county. On the return day, defendants not appearing after hearing the evidence of the plaintiff, the justice rendered judgment in his favor against defendants.

The writ of summons was made returnable on the third day after the date thereof, and as the Act of 1810 requires a summons to be made returnable not less than five days after the date, it is contended that this judgment is therefore void. We have, however, shown that

jurisdiction over the property was acquired by virtue of the attachment and proceedings thereon. If then there was error in the subsequent proceedings by making the summons returnable prematurely, it was an irregularity which could be corrected by *certiorari* only, and not in a collateral proceeding.

It is further urged, inasmuch as the individual names of all the persons composing the firm, were not set forth in the attachment suit, that the rights of those whose names were omitted are not affected by the judgment. If the question was, whether an execution on that judgment would authorize a sale of their individual property, there would be force in this position. Such, however, is not this case. The sale was of the property attached only. That was the property of the firm. So the question is, whether on a judgment against the firm the property of the firm can be sold? One partner may confess a judgment in the name of the firm of which he is a member, which will authorize a sale of the interest of all the partners in partnership property: *Ross v. Howell*, 3 Norris, 129.

We cannot expect and must not require an observance of strict rules of pleading before a justice. In many cases judgments have been held good, when against co-partners in the firm name, without stating the names of the persons composing the firm. Objections of this kind after verdict or judgment are not to be favored: *Porter v. Cresson*, 10 S. & R., 259; *Morse v. Chase & Co.*, 4 Watts, 456; *Seitz & Co. v. Buffum & Co.*, 2 Harris, 69. It must be conceded the judgment was against Stewart, one of the firm, and now one of the plaintiffs. It therefore follows as to him at least, his interest in the property was sold. His right in the property having been divested, the other partners could not unite his name with theirs and recover in an action of trover. A joint action in *tort* cannot be maintained when some of the plaintiffs are shown to have no right to recover. It is elementary law in actions *ex delicto*, that if too many persons are made co-plaintiffs the objection, if it appear on the record, may be taken advantage of, either by demurrer, in arrest of judgment, or by writ of error; or if the objection do not appear on the face of the pleadings, it will be ground of nonsuit on the trial: 1 Chitty Pleadings, 76. It follows the learned judge correctly held the plaintiffs could not recover.

Judgment affirmed.

For plaintiffs in error, *Messrs. Crosby & Crosby and Osmer, Dale & Freeman.*

Contra, Messrs. Charles W. Mackey and Dodds & Lee.

THE LIVERPOOL, LONDON & GLOBE INSURANCE COMPANY, Defendant Below, v. JACOB GÖHRING.

An award of arbitrators, otherwise fairly made, will not be set aside because of mistakes made by the arbitrators in estimating the loss or damage.

Where the insured and insurer agree upon appraisers or arbitrators to estimate the amount of loss or damage sustained by the insured, their award, in the absence of fraud or misconduct, is conclusive on both parties. Arbitrators or appraisers are the sole and exclusive judges as to what information is necessary to enable them to make a correct award or appraisal.

Error to the Court of Common Pleas of Westmoreland county.

This was an action by Jacob Göhring against the insurance companies, plaintiffs in error, to recover the amount of two policies of insurance of \$2,500 each, issued by said companies on his store at Irwin's station. The store was destroyed by fire. Subsequently a written agreement was entered into by the parties selecting S. F. Baker and D. W. Miller as appraisers, and agreeing that their award or estimate of the loss should be binding on both parties. Baker and Miller examined the premises, inquired as to the price of materials, and having heard the parties, made an award in favor of Göhring in the sum of \$4,013.89.

Göhring refused to accept the award and brought suit on the policies, alleging as his reason for so doing, that the appraisers omitted to estimate the value of certain spouting, etc., worth about \$40, and other items of small value.

On the trial, he alleged misconduct on the part of the arbitrators and insurance companies. The substance of these allegations is set forth in the opinion.

The verdict was in favor of plaintiffs against the first named company, in the sum of \$2,517.33 and against the second in \$2,482.70.

The defendant asked the court to charge, *inter alia* (third point), "that there is no evidence sufficient to show fraud or misconduct on the part of the arbitrators." This point the court answered as follows. "It is for the jury to say, under all the evidence, if there was fraud or misconduct, and this must be clearly and satisfactorily proved."

For plaintiffs in error, *Messrs. Edgar & Frank Cowan.*

Contra, Messrs. J. F. Wentling and J. S. Moorehead.

Opinion by GORDON, J. Filed November 7, 1881.

As a copy of the policy of insurance, upon which this suit was brought, has not been furnished for our inspection, we are not prepared

to say that the answers of the court below to the defendant's fifth and ninth points are incorrect. We have, however, no hesitation in pronouncing the answer to the third point erroneous. We have examined the evidence with care and have failed to discover that the arbitrators were guilty of the slightest misconduct. These arbitrators, or appraisers, were chosen by the parties under an agreement in writing duly and deliberately executed, and by the terms of that agreement they were to appraise and estimate the true cash value of the loss. They were chosen because they were practical builders and were expected to make their own estimates, and from those estimates form their judgment.

Therefore, that they went to a planing mill to ascertain the price of lumber, and to a tin smith to learn the price of roofing tin, so far from being evidence of misconduct, was proof of care and consideration; of a disposition to inform themselves of the ruling prices of the materials that had composed the building. They examined the ruins, took what measurements were necessary, listened to what information Gœhring had to give them, received from him a plan of the building, and, if he is to be believed, he put into their possession an estimate made for him by Greenawalt, an act that looks more like an attempt to improperly influence the arbitrators than any other in the case. Then, after they got all the information they thought necessary, and they were the sole and exclusive judges of what was necessary, they retired to a room in the hotel, and there, by themselves, both parties being excluded, they made their estimate and award. That this estimate was a fairly correct one is evidenced by the fact that Miller offered to rebuild the property for the amount of the award, a proposition which the plaintiff refused to accept. This, then, is the testimony of the arbitrators themselves, nor does the evidence of Gœhring, when trimmed of its obvious exaggerations, seriously contradict it. Leaving out the testimony as to the manner in which these men did the work to which they were appointed, the legal presumption is that they did their duty, and that presumption is not rebutted by such evidence as that of the plaintiff. That the "Liverpool gentleman" and the "Lycoming gentleman" hurried the arbitrators up so that he had no time to make his explanations and to show them "some little things" which he had left out of his memorandum; the running of the arbitrators down to the hotel in order that they might get to work as soon as possible; the call of the "Lycoming gentleman" for lemonade instead of water, of which he had imagined he was not to partake,

and, finally, how that in the forenoon he saw the arbitrators "promenading the street with the insurance men, hunting up evidence, down to Fulton's mill and around the ruins of the building; but they took good care to stay away from me," which means that, for his own purposes, he took good care to stay away from them. Such evidence as this, so evidently partial and with such a tone of flippant exaggeration running through it, goes but a very little way to the overthrowing of the award of a board of appraisers of the plaintiff's own choosing. One-sided and warped as this testimony evidently is, it reveals nothing that in the slightest degree impeaches the integrity of the board of arbitrators. What if they were hurried up? Perhaps that was necessary to expedite the business in hand, and at all events, it was no fault of the arbitrators that the insurance men hurried them up.

That they were promenading the street in search of evidence, so far from being a misfeasance, was, as we have already shown, in the line of their duty.

Then again the mistake complained of, if mistake there was, which is doubtful, was of a character so insignificant as to be unworthy of attention. Even were it much more important than it is alleged to be, it could not be used to set aside the award: *Speer v. Bidwell*, 8 Wr., 23.

Judgment reversed.

BRIGGS, Plaintiff Below, v. ERIE COUNTY.

Under the Act of May 8, 1876, P. L., 140, counties are not liable for the fees of official stenographers of the courts unless transcripts of their notes are filed by order of court, or made and filed in the performance of their general duty.

Error to the Court of Common Pleas of Erie county. The opinion states the facts:

Opinion by MERCUR, J. Filed November 14, 1881.

The Act of 8th May, 1876, Pur. Dig., 2054, authorizes the judges of the several courts of the Commonwealth to appoint a stenographer who shall be paid ten dollars for each day spent by him in taking notes in court, and be paid by the county or counties forming the judicial district. Section 4, imposes additional duties and declares by whom such services shall be paid. He is required "to furnish a copy of his notes of testimony written out in long-hand upon the order of the court or the request of counsel in the cause, during the progress of the trial or at any subsequent time; also within a reasonable time after trial to transcribe all notes, not previously transcribed by order of court, which transcripts shall be filed and made a part of the records of

the case." Provided in the discretion of the court with the consent of counsel, he may be excused from transcribing notes and furnishing transcripts; but then he shall preserve the notes for future reference or transcripts if desired. The section proceeds the transcripts thus made shall be furnished at a compensation specified, "to be paid by the county in which the notes are taken, when the transcript is ordered by the court, or when made for the purpose of being filed; and by the counsel in the respective cases, when ordered by them."

Thus the county is liable to the stenographer only when the transcript is ordered by the court or where made to be filed, in performance of his general duty. During the progress of the trial "or at any subsequent time," counsel in the case, may require the evidence to be written out at length; but whenever so required by counsel, the compensation therefor shall be paid by the counsel ordering the same. The act contains no language imposing a liability on the county to pay, when the transcript is ordered by counsel, whether it be during or after the trial. The language imposing the liability to pay on the counsel ordering it, is the same in each case. Making a copy for counsel during trial, will not dispense with the obligation of the stenographer to make another to file after trial. He is only excused from making one to file that he has previously transcribed "by order of court." The counsel has a right to procure a transcript for his own use. The court to require it, as a part of the record.

The stenographer is paid out of the public treasury for all his services in attending court and taking stenographic notes. The liability of the county for further compensation to the stenographer, cannot be enlarged by any action of counsel in the case. Nothing in the act authorizes counsel in the case to assume any of the powers given to the court, and thereby impose costs on the county.

The case stated shows that after the trial of a certain cause, in the Common Pleas of Erie county, at the request of the attorneys of the plaintiffs therein, the stenographer made and filed a transcript of his stenographic notes. By reason thereof he seeks in this action to recover his compensation therefor from the county of Erie. The learned judge correctly held the county was not liable for a transcript furnished at the request of counsel, although it was filed of record in the case. *Judgment affirmed.*

For plaintiff in error and below, *Messrs. C. B. Curtis and L. S. Norton.*

Contra, Messrs. D. B. McCreary and Frank Gunnison.

Circuit Court, United States.

Western District of Pennsylvania.

CASS v. THE MANCHESTER IRON AND STEEL COMPANY et al.

A charter ought to be liberally construed to effectuate the object of the creation of the body corporate; but it cannot be regarded as possessing any power which is not conferred upon it by express grant or clear implication.

It is beyond the scope of the power of a corporation organized under the Act of April 29, 1874, whose fundamental object as declared by law is the manufacture of iron and steel, or other metals, either separately, or in combination with each other or with wood, to make a lease for not less than five years and not exceeding ten of the whole plant of the corporation, thereby relinquishing for said period, and transferring to others, the faculty of prosecuting the business which its charter contemplates and authorizes.

The change involved in such contract is so thorough and fundamental, that if within the power of the corporation, the lease ought not to be entered into by the board of directors independently of the judgment of the stockholders and without express authority from them; and a court of equity upon a bill filed by a director, who in his own right owns a majority of the stock and who had protested against the lease, will enjoin the board of directors from making it.

Motion for preliminary injunction.

Opinion by McKENNAN, Cir. J. Filed December 27, 1881.

The Manchester Iron and Steel Company is a private corporation, authorized by an Act of the Legislature of Pennsylvania, passed April 29, 1874. By the certificate of its incorporation it is placed in the class of corporations for profit, and under the 17th division of that class, as a corporation for "the manufacture of iron or steel, or both, or of any other metal or of any article of commerce from metal or wood or both." Its powers, therefore, are derived from and are defined by the 38th section of the act, which relates specially to corporations of that description. The first clause of that section, which is the only portion of it that is material, provides that "every such corporation may, in the manner prescribed by this act, increase its capital stock to an amount not exceeding five millions of dollars, and shall have the right to purchase, lease, hold, mortgage and sell real estate and mining rights, to prove and open mines, to mine and prepare for market or for their own use and consumption, coal, iron, ore and other materials, and to erect and construct furnaces, forges, mills, foundries, manufactories, and such other improvements and erections as they may deem necessary, and to manufacture iron and steel, or any other metal, or either thereof, in all shapes and forms, and either of these metals, exclusively or in any combination

with other metals, or with wood, and to transport all of said articles or any of them to market, and to dispose of the same, and do all such other acts and things as a successful and convenient prosecution of said business may require; *Provided*, they shall not, at any time, have more than ten thousand acres of land within this Commonwealth, including leased lands."

The organization of the company defendant embraces a president and four directors, of whom the complainant is one, and represents, in his own right, a majority of the stock issued by the corporation. In that character he files his bill, alleging that the annual election of directors by the stockholders is to occur on the 19th of January, 1882, and that a majority of the board of directors have determined and proposed, against his protest, before the annual election, to lease the whole plant of the corporation for a term of not less than five years, with an option in the lessee to purchase the premises at a price to be fixed in the contract. He, therefore, asks the intervention of this court to restrain the proposed action of the directors.

The respondents' admit that they propose to lease the property of the corporation to a responsible tenant for a term of not less than five years and not exceeding ten, at an annual rental of not less than \$20,000, with additional incidental payments to be made by the lessee, and they allege that the completion of this arrangement requires prompt action on their part, and that it was, in the highest degree, conducive to the interests of the stockholders.

In the view we take of the case, it is unnecessary to consider whether the contemplated lease is expedient or not. Under ordinary circumstances, that consideration is addressed solely to the discretion and judgment of the governing power of the corporation, and a court of equity would not, therefore, assume to control it.

The primary question is, has the corporation the power, under its charter, to make the proposed lease, and if so, ought it to be exercised by the directors, without reference to or against the judgment of the stockholders?

A charter ought to be liberally construed to effectuate the object of the creation of the body corporate, but it cannot be regarded as possessing any power which is not conferred upon it by express grant or clear implication. The rule as stated by Mr. Justice MILLER, in *Thomas v. Railroad Company*, 11 Otto, 82, is, "that the powers of corporations organized under legislative statutes are such, and such only, as these statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains

that the charter of a corporation is the measure of these powers, and that the enumeration of these powers implies the exclusion of all others."

The corporation in this case is a manufacturing association, resulting from its statutory classification, and its description in letters patent. The fundamental object of the association, as declared by law, is the manufacturing of iron and steel, or other metals, either separately or in combination with each other or with wood, and it is obvious that the powers conferred upon it are incidental and auxiliary to the main purpose of its creation, and are to be exercised through its corporate organization. In the 38th section of the statute (above quoted), the powers of the corporation are enumerated specifically, but the power to lease is not found in this enumeration. In the language of Judge MILLER, this omission "implies the exclusion" of such power. The power to lease is given, but it is to acquire property in that mode. Even if it can be construed otherwise, or can be implied from, or is embraced in, the express power to sell, as was argued, it is limited, in its exercise to real estate and mining rights, and does not comprehend the entire plant of the corporation.

We are of opinion, then, that the charter contemplates and authorizes the prosecution of the business described in it, by the corporation itself, by the direct agency and under the supervision, management and administration of the corporate officers whom the stockholders may elect for that purpose; and that a contract which involves a relinquishment of this faculty, or a transfer of it to others, is beyond the scope of the power of the corporation.

But if this conclusion is the result of too strict a construction of the charter, we are of opinion that the power in question is not exercisable independently of the judgment of the stockholders. The directors and officers of a corporation are its exclusive executive agents, and, as it can only act by and through them, the powers vested in the corporation are deemed to be conferred upon its representatives; but they are nevertheless trustees for the stockholders. The law recognizes the stockholders as the ultimately controlling power in the corporation, because they may at each authorized election entirely change its organization, and may, at any time, keep their trustees within the line of faithful administration, by an appeal to a court of equity. Hence it has been held, that the directors of a corporation cannot alone increase its capital stock, where such increase was authorized by its charter, "at the pleasure of said corporation," and where it was provided "that all the

powers of said corporation shall be vested in and exercised by a board of directors," etc., and this for the reason that, "the general power to perform all corporate acts refers to the ordinary business transactions of the corporation," and not to a change so fundamental and organic: 18 Wall., 234.

The change proposed here is not organic, it is true, but it is thorough and fundamental, as it affects the administration of the company's affairs. It involves a withdrawal from the control and management of the stockholders of the entire property of the corporation for a period of at least five years; it will preclude, for a like period, the exercise annually by the stockholders of their judgment as to the particular character and method of conducting the business affairs of the corporation; and it denies to the stockholders any right of suggestion or disapproval of the conditions when such a relinquishment of important corporate faculties may be conceded. Surely a power which will be attended with such consequences, does not relate "to the ordinary business transactions" nor "to the orderly and proper administration of the affairs" of the company, and hence cannot be exercised by the directors, without express authority to them.

But the fact is conceded that the complainant represents a majority of the stock issued by the corporation, and he has made known to us in his bill, that the proposed lease is repugnant to his judgment. We are, therefore, called upon to decide, not merely that it may be made by the directors without consulting their constituents, but against the protest of a majority of them. This we cannot do, but order that a preliminary injunction be issued as prayed for.

For complainant, *Messrs. Knox & Reed.*

For respondents, *Messrs. William Scott and Hampton & Dalzell.*

District Court, United States.

Western District of Pennsylvania.

IN BANKRUPTCY.

In Re CODDING & RUSSELL, Bankrupts.

Real estate owned and held by co-partners as partnership property and brought into the firm stock, is not converted absolutely. It is to be treated as personalty in so far as may be necessary to secure the payment of the firm debts and advances made by the partners respectively; but for every other purpose it remains real estate.

A judgment against a partnership for a partnership debt entered by confession of all the partners, is a lien upon the partnership real estate.

Sur exceptions to register's report distributing fund from sale of real estate.

Opinion by *ACHESON, D. J.* Filed December 22, 1881.

This contest is over a fund realized from the real estate of the bankrupts sold by the assignee divested of liens. The claimants are Lawrence Butler and Matthew Jackson, two judgment creditors of the bankrupt firm, on the one hand, and, on the other, the assignee in bankruptcy. The judgments are not assailed as unlawful preferences, but it is denied that they were liens against the real estate; and, therefore, the assignee claims the fund for the benefit of the general creditors of the firm.

No exceptions having been filed to the register's findings of fact their correctness will be assumed. These findings are substantially as follows:

John A. Coddington and Chauncey S. Russell, the bankrupts, composed the firm of Coddington & Russell. The said real estate was owned and held by the bankrupts as co-partners, for partnership purposes and as partnership property. The judgment of Lawrence Butler was entered against "Coddington, Russell & Co." (a name by which the firm was formerly designated) upon a judgment note signed "Coddington, Russell & Co." The judgment of Matthew Jackson was entered against "Coddington & Russell" upon a judgment note signed "Coddington & Russell." The consideration of each note was money loaned to and used by the partnership. Both partners participated in giving the notes, and the judgments thereon were each entered at the suggestion of both the partners.

Any question growing out of the Butler judgment note having been entered up in the old firm name may be dismissed from the case; for the Jackson judgment alone, under the rule which prevails in this court to allow interest on a judgment down to the time of distribution, would absorb the whole fund, and Jackson does not question the lien of Butler's judgment or his right to be paid out of the proceeds of sale.

The question upon which the case turns, is, whether a judgment against a partnership, for a partnership debt, entered by confession of the firm and at the suggestion of all the partners, is a lien against the partnership real estate? The register held, that it was not, and he awarded the fund to the assignee in bankruptcy. The decision of the register rests exclusively upon the assumption that partnership real estate is personalty, and, therefore, not the subject of a judgment lien.

But the doctrine that partnership real estate is to be treated as personalty is not to be pushed too far. Real estate brought into a firm as stock is not converted absolutely and for all purposes.

The conversion manifestly has its limitations. For example, partnership real estate unquestionably is governed by the statute of frauds. Again, to pass the title each partner is required to join in the conveyance: Story on Part., Sec. 94; Parsons on Part., p. 377. I suppose no one would seriously maintain that on an execution against a firm a constable could seize and sell their real estate. It was held, in *Foster's Appeal*, 74 Pa. St., 391, that after payment of the firm debts and the advances made by the surviving partner, the remaining share of a deceased partner in partnership real estate passed not to his personal representatives but to the widow and heirs. Conversion of partnership real estate is allowed to secure—in the interest of the partners themselves—the payment of the firm debts and advances made by the partners respectively: *Ibid.* Therefore, the true doctrine as I conceive, is, that in so far as may be necessary to attain those ends partnership real estate is to be treated as personalty, but for every other purpose it remains real estate and is subject to the principles and laws applicable to that species of property.

Why then is partnership real estate not bound by the lien of a judgment against the partnership for a partnership debt, especially where such judgment is entered by confession of the firm and at the instance of all the partners? From a very early period it has been the settled law of Pennsylvania that a judgment is a lien on every kind of right—on every sort of beneficial interest—in real estate, vested in the debtor at the time of the judgment: *Corkhuff v. Anderson*, 3 Binn., 9; Troubat & H., Sections 58, and 778; Price on Liens, 277.

The general creditors of a firm are preferred in the distribution of firm assets wholly by virtue of the equities of the partners and not on account of any equities of their own. They themselves have no lien upon the partnership property. What right therefore have they, or an assignee in bankruptcy who represents them, to gain say the lien of a judgment upon the partnership real estate, where that judgment is for a firm debt and was entered against the partnership by the confession of the firm? The validity of a mortgage given by partners upon partnership real estate was distinctly recognized in *Lancaster Bank v. Myley*, 13 Pa. St., 543. But if the partners may encumber their real estate by mortgage, why may they not do so by judgment? Undoubtedly it was the intention of Coddington & Russell to give Butler and Jackson judgment liens; and I am at a loss to see upon what principle that intention is to be frustrated by the assignee in bankruptcy who stands

in this matter in no better position than the bankrupts themselves.

While perhaps the precise question now before me has not been judicially determined, yet in more than one case the validity of such judgment liens, it would seem, has been assumed: *Overholt's Appeal*, 12, Pa. St., 222; *Erwin's Appeal*, 39 *Id.*, 535. And it is said by Mr. Price in his work on liens that a judgment for a firm debt would bind the real estate of the firm: Price on Liens, 280-1.

And now, December 21, 1881, the exceptions to the register's report are sustained; and it is ordered that the fund for distribution be applied first, to the payment of the judgment of Lawrence Butler, and the residue to the judgment of Matthew Jackson, and that the assignee pay the fund to said judgment creditors in accordance with this decree.

By the Court.

For exceptants, Messrs. Williams & Augle and John W. Mix.

For report, William A. Stone, Esq.

Court of Common Pleas, No. 1.

WEITERHAUSEN v. SHANER et al., Partners, doing Business as THE REAL ESTATE LOAN AND TRUST COMPANY.

A. handed to B., the cashier of a banking partnership, after banking hours and on a public street, a note drawn by C., who was insolvent to the order of D., and by D., who was solvent, indorsed in blank, with instructions to collect it. B. took the note, and when it matured placed it to the account of D., as though he was the owner. In an action by A. against the partnership, held, that they were liable for the neglect of the cashier to make demand of the maker and give notice of non-payment to the indorser.

Question of law reserved. The opinion states the facts:

Opinion by STOWE, P. J. Filed December 8, 1881.

The evidence in this case showed that the defendants were a banking firm, doing business in Allegheny City, and as a part of the business received deposits and took notes for collection, and that it was their duty in collecting notes to make demand upon the makers at maturity, and in case of non-payment, protest the notes and give due notice thereof to the indorsers. The plaintiff was a depositor and had an account with the bank. Shaner was the cashier and active business agent of the defendant's bank, and also a partner. About April 1, 1878, while Shaner was holding this relation to defendants and the bank, the plaintiff met him upon the street, some square or more from the place where the bank carried on its business, after its regular business hours, say between 5 and

6 o'clock P. M. (the bank closing at 4 o'clock), and handed him a note, made by F. Staumpf to the order of Charles Kellner, and by him indorsed in blank for \$200, dated January 30, 1878, and payable in ninety days, stating that he wished it collected. Shaner took the note and marked the letter "C" on it. He received it for collection on account of the bank and as cashier, and not as a personal matter. The evidence also shows that he put the note in his pocket-book and forgot it for sometime, when afterwards seeing it, he took it and placed it in the bank, and when it matured placed it to the credit of the indorser, Kellner, as though he was the owner, and failed to give him notice of non-payment. The maker was and still is utterly insolvent, and Kellner, the indorser, was and still is able to pay, but being released from liability by reason of the want of protest and notice, has not and will not pay the note.

The defendants not controverting any of these matters, alleged at the trial that the defendants were not liable, because the defendant's bank had a regular banking-house and place of business and was governed by the ordinary rules in relation to doing business by banks. That this transaction was not done at the bank nor within their regular banking hours, and generally that the cashier exceeded his authority in receiving a note to collect under the circumstances, and that, therefore, defendants were not liable for his mistake or negligence by which the plaintiff lost his money.

Upon this theory the court was asked to charge the jury that,

First. The note in question having been given Shaner, one of the defendants, in the street, after banking hours, without any special instruction except to collect it, his acceptance would not bind the defendants.

Second. The delivery of said note to Shaner on the street, after banking hours, without anything on the papers to indicate ownership, was such negligence on part of plaintiff as will prevent him recovering against defendants.

These points were refused *pro tempore*, and the jury directed to find a verdict for plaintiff, subject to the questions of law thus raised.

The whole matter depends upon the power of Shaner, the cashier and partner, to bind his fellow-partners and the firm by receiving a note for collection from a customer of the bank, after banking hours, and upon the street, at a distance from the bank.

If this were the case of a corporation, or if Shaner were not a partner, I have no doubt in the absence of proof of a custom to the contrary, that such an act would not bind the de-

fendants, because it would clearly be an excess of authority on the part of the cashier. But this was an ordinary banking partnership in which Shaner and the other defendants were ordinary partners, and by that very relation were authorized to act for each other, and for the firm in relation to whatever pertained to carrying on the business of the bank to the fullest extent. Whatever properly fell within the partnership business, one could do, just as well as all together, and particularly so when, as in this case, that one was the general business manager.

So far is this principle carried that a firm will be bound by the frauds committed by one partner in the course of the partnership business, even when the other partners have not the slightest connection with or knowledge of, or participation in the fraud, for by forming the connection of partnership the partners declare to the world that they are satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns: Story on Partnership, § 108.

Judgment is now directed to be entered upon the verdict in favor of the plaintiff and against defendants upon payment of the verdict fee.

For plaintiff, *W. D. Porter, Esq.*

Contra, J. S. Slagle, Esq.

NEW BOOKS.

THE AMERICAN DECISIONS, containing the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports, to the year 1869. (Compiled and annotated by A. C. FREEMAN, Esq., Counselor-at-Law, and author of "Treatise on the Law of Judgments," "Co-Tenancy and Partition," "Executions in Civil Cases," etc. Vol. XXX. San Francisco: A. L. BANCROFT & Co., Law Book Publishers, Booksellers and Stationers. 1881.

The cases re-reported in this volume are from 15, 16 Wend.; 1, 2 Dev. & Bat. Law; Dev. & Bat. Eq.; 7 Ohio; 1, 2 Wharton; 5 Watts; 3 Hill (S. C.); 1 Riley; 2 Hill (S. C.), Ch.; 1 Riley Ch.; 9, 10 Yerg.; 8 Vt.; 7 Leigh; 4, 5, 6 Porter; 12 Conn.; 2 Harr.; 1 Scam.; 4 Blackf.; 5 Dann.; 11 La.; 14 Maine; covering a period from 1836 to 1838.

—A Minnesota District Judge, not long ago, decided in a divorce case that it was not adultery for a man to be improperly intimate with his servant girl, and gave in his opinion as reasons for the decision, that public policy and public interests and necessity required that he should be! Minnesota will be a good State for Benedicts who are enamored of their servant girls to reside in until the learned (?) judge is reversed. He has since been impeached for drunkenness!

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No. 24.

PITTSBURGH, PA., JANUARY 25, 1882.

Supreme Court, Penn'a.

MCCUTCHEON'S APPEAL.

Under the Act of April 15, 1868, if a policy of insurance is issued in favor of the wife, children, or other dependent relative of the assured, the title in such beneficiary is good against the claims of creditors, although the assured was insolvent at the time the policy was issued. An assignment of a policy of insurance, procured from a wife by undue influence and coercion on the part of the husband, is void.

The assignee in such a case is not a purchaser for value, by reason of a claim he may have against the assured, which is secured by the assignment.

Elliott's Executor's Appeal, 14 Wright, 75, distinguished.

Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county.

William McCutcheon in 1871, obtained two policies of insurance on his life, one for \$10,000 subject to the payment of premiums, and the other for \$834, fully paid up. These were issued under an agreement that McCutcheon should surrender a former policy for \$10,000, and receive therefore the two above mentioned, so that he would still hold a \$10,000 policy. Both of these, as was the original policy were in favor of his wife, Clarissa McCutcheon, the appellant. McCutcheon procured from his wife an assignment of these policies to John Wilson, a creditor; Mrs. McCutcheon received no consideration therefor. Notice was given the company by Wilson of the assignment, and with the exception of the first and second premiums, all the premiums were paid by him and his representatives after his death. After McCutcheon's death, in 1879, Mrs. McCutcheon repudiated the assignment, and claimed the proceeds of both policies on the ground that the assignment had been obtained from her by coercion. Mrs. Wilson, as executrix of John Wilson, also claimed the proceeds. Under this state of facts the insurance company filed a bill against the appellant and Mrs. Wilson to compel them to interplead for the fund. After answers filed the cause was referred to S. A. McClung, Esq., as master, before whom the above facts, *inter alia*, appeared.

The master reported in favor of Mrs. McCutcheon as to the proceeds of the smaller policy

but awarded the larger one to Mrs. Wilson on the ground that McCutcheon had taken out this policy when he was insolvent, and that therefore, it was a fraud on creditors, although the assignment had been procured from Mrs. McCutcheon by undue influence and coercion. Exceptions were filed by appellant, but overruled by the court and a decree made awarding the fund as above indicated. An appeal was taken, the errors assigned being the overruling of the exceptions and the decree of the court.

For appellants, *Messrs. Geo. Shiras, Jr., and C. C. Dickey.*

Contra, John G. Bryant, Esq.

Opinion by GREEN, J. Filed November 21, 1881.

In *Elliott's Executor's Appeal*, 14 W., 75, it was carefully said that we did not intend the doctrine of that case to apply to the case of policies effected directly to the wife. READ, J., on page 83, used the following language: "We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud directly and on their face for the benefit of the wife and payable to her; such policies are not fraudulent as to creditors and are not touched by this decision." The policies in that case were effected in the name of the husband and by him assigned to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors and was void, as against them, under the Statute of 13th Elizabeth. Here, however, the policy was effected in the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount also issued in the wife's name.

Now the Act of 15th April, 1868, *Purd. Dig.*, p. 802, expressly provides that, "All policies of life insurance, or annuities on the life of any person which may hereafter mature, and which have been or shall be taken out for the benefit of, or *bona fide* assigned to, the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, free and clear from all claims of the creditors of such person." The plain meaning of this language is that protection shall be given to the wife, children or dependent relative of the assured in two distinct classes of cases: First, those in which the policy was originally issued or taken out for the benefit of the persons named; and, second, those in which policies

previously issued shall be, in good faith, assigned to those persons. The question of good faith, or fraud, only arises in the latter class; that is, when the title of the beneficiary arises by *assignment*. When it exists by force of an *original issue*, in the name, or for the benefit of the beneficiary, the title is good notwithstanding the claims of creditors. In other words, the very object and purpose of the act was to enable insolvent persons to make provision in this way for their families or dependent relatives, which should be good and effective as against, and free and clear of all claims of creditors. There is no anomaly in this, nor any conflict with the letter or spirit of the Statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise, as to his creditors. It is only in case of the assignment of a policy that once belonged to the assured that the question of fraud can arise under this act. If the assignment was made in good faith and without fraud it would prevail even against creditors, but if not, they could avoid it. It was just here, in failing to observe this distinction, that the learned master and court below fell into error. The master inferred the fraud from the mere fact of the insolvency, but that inference, as we have seen, is not warranted in such a case as this. In all other respects the findings and conclusions of the master were in favor of the appellant and we concur in their correctness.

No appeal has been taken from the finding that the assignment by the appellant to Wilson was obtained by undue influence and coercion of her husband, and, therefore, that fact must be now considered as conclusively determined. Nor do we see any reason to doubt the correctness of the master's finding on this subject, even if it were an open question. We consider that he is equally correct in his conclusion that Wilson cannot be regarded as an innocent purchaser for value. He merely took the assignments as collateral security for a pre-existing debt or liability. He paid the maturing premiums voluntarily, and is of course entitled to have them returned with interest from the time of their payment. The master also rightly determined, that as none of McCutcheon's creditors were impugning the validity of the assignment to Wilson, it was not affected by the circumstance that he concealed the fact of his holding it from them, when the composition was effected. It follows that the decree of the court below must be reversed and modified.

Decree reversed and record remitted for further proceedings, and it is ordered that the fund

in the court below be distributed by awarding to Sarah Ann Wilson, executrix of John Wilson, deceased, the full amount of all premiums paid by him and by his said executrix, together with interest on such payments from the time they were respectively made, and the remainder of the fund to Clarissa McCutcheon, the appellant, the costs of this appeal to be paid by the appellee.

**FREDERICK BECKER et al., Defendants Below,
v. FREDERICK WERNER.**

Where a lease provides that failure to pay rent or taxes, or that to assign the lease without the written consent of the lessor, shall forfeit the lease, a breach of any of said covenants is a ground of forfeiture.

A landlord may, under such lease, issue a warrant and collect the rent in arrear and afterwards exercise his right to forfeit the lease for non-payment of taxes, etc., and this though the taxes be due and unpaid when the rent is collected.

If the lessee mortgage his leasehold, which by the terms of his lease cannot be assigned, such mortgage is a nullity as to the landlord, and is a ground of forfeiture, being in effect an *assignment* of the lease.

Where a married woman joins with her husband in a mortgage on premises, to which she has no title, she is not thereby estopped from defending her title thereto subsequently acquired, against said mortgage.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

On the 30th day of March, 1877, Schenley and wife, by their attorney in fact, N. B. Hatch, leased to Frederick Becker a lot of ground in the Third ward, Allegheny, for the term of twenty years. The lease provided, *inter alia*, that the lessee should pay the rent, pay all taxes, and should not assign the lease without the written consent of the lessor. Shortly after leasing the property, Becker and his wife executed a mortgage on some land belonging to Becker in Ross township, a house and lot belonging to Mrs. Becker in Allegheny, and on the Schenley leasehold, Mrs. Becker joining in the mortgage without reciting her separate title. The mortgage did not describe the Schenley property as a leasehold. In July, 1879, there being rent and taxes in arrear, a warrant was issued for the collection of the rent, and under it the improvements were sold to Louis Schafer. Afterwards Mrs. Schenley made a lease to Schafer for the unexpired term. Schafer was acting as trustee for Mrs. Becker and received the money paid at the constable's sale from her. The mortgage above referred to was then foreclosed and the leasehold sold to Werner, who received his deed from the sheriff and then began proceedings before an alderman to get possession of the premises. The necessary affidavit having been filed the case was certified to the court for trial. At the trial a variety of

questions were presented and passed upon, but few of these are discussed in the opinion.

The court below reserved the question: "Is the mortgage valid, the lease not having been recorded with it?" And subsequently decided it in favor of Werner, the plaintiff. This question arose under the provisions of the Act of 1855 and its supplements. The verdict was in favor of the plaintiff and the reserved question being also decided in his favor, judgment was entered accordingly.

For plaintiff in error, defendant below, *Messrs. A. M. Watson and A. J. Kirschner.*
Contra, W. C. Moreland, Esq.

Opinion by PAXSON, J. Filed November 7, 1881.

This case at first sight would seem to require a great deal of winnowing to separate the wheat from the chaff. A close examination of it, however, leads us to the conclusion that the real matter of controversy lies in a very narrow compass.

The learned judge of the court below charged the jury (see fourth assignment), that "Mr. Torrence might, at the time he issued his landlord's warrant, in July, 1879, have included all the arrears of taxes at that time, but he did not; he issued his landlord's warrant simply for the rent due, leaving the taxes unpaid; he could not then forfeit the lease simply because there were arrears of taxes unpaid. I don't remember that there was a particle of evidence in this case to the effect that Mr. Patterson or any person ever notified Mr. Becker that they would forfeit the lease." The learned judge further instructed the jury (see third assignment): "I say to attempt to forfeit the lease of Becker without notice to him, and under such circumstances, was a manifest and palpable absurdity."

The clause of forfeiture in the lease contains the following language: "And in case of violating these covenants or any of them, or of transferring this lease without the written sanction of said lessors, said lessee and his assigns shall forfeit said lease and improvements, and the lessors may, either with or without any writ or legal process, at their option, re-enter and hold said premises and the improvements, buildings, etc., from which time all claims by defaulting lessee shall wholly cease."

At the time of the forfeiture there were three distinct breaches of covenant on the part of the lessor: (1) The rent was in arrears; (2) the taxes were unpaid, and (3) the lessee had mortgaged his leasehold, which in law was equivalent to an assignment of it. Each of these breaches was a ground of forfeiture. When the

distress was made for the rent the overdue taxes were not included in the landlord's warrant, as they might have been, under the terms of the lease. Including the taxes in the warrant was optional, and their omission by the landlord deprived him of no right. If at the time the rent fell due there were other breaches of covenant, he had the right to collect his rent by distress, and at the same time proceed to forfeit the lease for such breaches; otherwise he might lose his rent by reason of the forfeiture. This view renders it unnecessary to discuss the question how far the forfeiture could have been sustained under the circumstances had the non-payment of the rent been the only breach of covenant by the lessee.

It was contended, however, that the forfeiture was without notice to Mr. Becker, the lessee, and was otherwise irregular and of no effect.

Mr. Patterson says in his testimony: "I went over on the premises. Mr. Torrence had told me that the rent was not paid, and directed me to forfeit it. I drew up a notice in writing and went over on the premises and took possession of the leasehold, served notice on the sub-tenants then in the houses, notified them that the estate took possession of the property, and notified Mr. Becker."

It will thus be seen that Mr. Becker had notice. We need not speculate how far the proceedings were invalid as to him had he objected to them. But he has never made such objection, and is not now in court denying the regularity of the proceedings. The objection comes from a party who is a stranger to the transaction, and who has no equity to be heard. The mortgage upon the leasehold through which he claims title fell with the forfeiture. The creation of the mortgage was prohibited in substance by the lease, and was a ground of forfeiture. The lessee having no right to assign his lease could not do so indirectly by mortgaging it. As against the landlord the mortgage was a nullity, and it cannot be successfully set up against the title acquired through the forfeiture and constable's sale. That title is now in Louis Schafer, as trustee for Mrs. Becker, who furnished the money out of her separate estate to pay the bid at the constable's sale. The original lease was to Frederick Becker, her husband. It is not pretended that she had any interest in this lease, and she certainly was not a party to it. It is true she joined in the mortgage of the lease, but that was merely through the ignorance or carelessness of the scrivener. The mortgage covered other property which admittedly belonged to Mrs. Becker, and joining in the mortgage of the leasehold of her husband

was simply a blunder. It furnishes no just ground of estoppel in this proceeding.

The judgment is reversed, and it is now ordered that judgment be entered in favor of the defendants below upon the question of law reserved.

DAILEY'S APPEAL.

A. and B., after their marriage, lived for ten months at A., the husband's mother's house, then the mother ordered B., the wife, out of the house. B. went to her stepfather's and lived there, A. never visiting her but once. *Held*, that it should have been left to the jury to determine whether A. willfully deserted her.

Appeal from the Court of Common Pleas of Monroe county.

Opinion by STERRETT, J. Filed May 2, 1881.

The substantial question, involved in the issue demanded by the respondent in the court below, was whether he willfully and maliciously deserted his wife. If the testimony tended to establish the affirmative of the issue, it was improperly withdrawn from the jury by instructing them, as a matter of law, that their verdict should be for the respondent.

The libellant testified in substance that after their marriage she and her husband had lived together at the residence of his mother for about ten months, when the latter ordered her away and compelled her to leave the house; that she then appealed to her husband to join her in seeking another home, but he refused to do so, and having no other place of shelter, she was compelled to go to her former home; that, ever afterwards, he not only refused to provide a home for her, or contribute in any manner to her support, but treated her with such studied indifference and disrespect that he never even called to see her, except on the next evening after she was obliged to take refuge under her stepfather's roof. On that occasion he came to the house and invited her to attend his funeral two days thereafter, but, having no faith in his implied suggestion, she declined the invitation. Thenceforth, according to her own testimony and that of other witnesses, by whom in the main she is corroborated, she appears to have been entirely abandoned by him.

The issue as to the charge of willful and malicious desertion was granted upon respondent's demand, and, viewing the testimony as a whole, we think it should have been submitted to the jury. If they were satisfied that libellant was practically driven away from the house by respondent's mother, and he not only neglected to provide another home for her, but never afterwards manifested the slightest desire to do so; in short, if his conduct toward her for a

period of over two years was inconsistent with anything else than a determination on his part to ignore every marital obligation, the jury would have been warranted in coming to the conclusion that he had in fact willfully abandoned and deserted her. If he thus acted willfully and without cause, it necessarily follows that his conduct was also malicious.

Judgment reversed and venire facias de novo awarded.

Orphans' Court.

In Re Estate of F. L. IHMSEN, Deceased.

- (1.) Where an executor has died insolvent, having paid part of a "residue" for distribution, the unpaid balance of the "residue," not the whole "residue," is provable against his estate.
- (2.) A release of a drawer without reservation operates as a discharge of the indorser.
- (3.) Where, by consent of a mortgagee, real estate of a decedent is sold by order of the Orphans' Court, divested of the lien of a mortgage in which there is a stipulation for attorneys' commissions for collection, reasonable compensation for necessary services of counsel will be allowed by the Orphans' Court as part of the costs.

(1.) F. L. Ihmsen, as surviving executor of the will of C. Ihmsen, deceased, filed an account of his administration to March Term, 1876, in which matters of administration and distribution were mingled. Numerous exceptions were filed to items of administration therein, but none to items of distribution. These exceptions were by consent referred to an auditor, who reported, January 5, 1880, a large balance for distribution, upon which accountant was credited with different amounts paid distributees; some less and others more than their shares therein.

Exceptions were filed to this report, but before they were heard F. L. Ihmsen died. The balance for distribution was subsequently reduced, and the exceptions dismissed by consent. In the present audit the whole balance for distribution found, as above stated, was presented, and a dividend claimed thereon out of the balance in the hands of this accountant for distribution. This claim was resisted and the question presented on these facts, is, on what amount should the dividend be declared—on the whole balance for distribution, or on the balance unpaid?

(2.) The First National Bank of Birmingham presents here certain notes—some of which are drawn by F. L. Ihmsen and indorsed by C. Ihmsen, Jr., & Co., and others drawn by C. Ihmsen, Jr., & Co. and indorsed by F. L. Ihmsen. After these notes had been given, C. Ihmsen, Jr., procured a mortgage, given by himself

to F. L. Ihmsen for \$30,000 to be assigned as collateral security to the bank. Subsequently suit was brought on this mortgage by the bank, defense was made by the terre-tenant on the ground of fraud, a verdict was had for plaintiff, and the property embraced in the mortgage sold to the bank for \$6,000. "At the time of this verdict the bank agreed not to hold C. Ihmsen, Jr., & Co. on their paper." The notes presented here aggregate \$18,255.

Notes drawn by C. Ihmsen, Jr., and C. Ihmsen, Jr., & Co. \$13,805
Notes drawn by F. L. Ihmsen amount to 4,450

\$18,255

It is objected to the allowance of the paper indorsed by F. L. Ihmsen that the above stated agreement with C. Ihmsen, Jr., & Co. operated as a release.

(3.) The fund for distribution here is the proceeds of realty sold. The sale was made divested of liens by consent of mortgagees. The mortgages on the land sold contain clauses stipulating for attorneys' commissions for collection, etc. The mortgagees were represented by counsel in the proceedings for sale, at the sale and at the audit here, and crave allowance for these services out of the fund for distribution, as being expenses of collection. *Scire facias* had not been instituted on the mortgages.

Opinion by HAWKINS, P. J. Filed December 16, 1881.

(1.) The executor of the will of C. Ihmsen, deceased, was clearly entitled to credit for payments made in distribution, to the extent of the distributive shares of the legatees in the balance found by the auditor. The fact of payment was admitted and there were no intervening rights of creditors. That the legatees were paid in unequal amounts does not effect the validity of the payments made. But as the rights of the distributees in the balance were fixed by law and were independent of each other, the executor obviously had no power to make payments in excess of their distributive shares out of the assets. Consequently the balance, after deduction of the amounts legally paid in distribution, is the amount for which the estate of F. L. Ihmsen, deceased, is liable and on which the dividend is to be declared here: *Ake's Appeal*, 21 Pa. St., 320.

(2.) It is clear on the authorities that, in the absence of evidence of an express reservation of rights, the agreement "not to hold" C. Ihmsen, Jr., on the notes presented here by the First National Bank of Birmingham operated as a release of F. L. Ihmsen as indorser: *Hagey v. Hill*, 75 Pa. St., 108. The evidence does not show on what, if any, consideration the release

of C. Ihmsen, Jr., was based. It could not have been the verdict for that was based on a mortgage which had been assigned as the property of F. L. Ihmsen, and was far in excess of the amount of all the notes, including those of F. L. Ihmsen, for which the mortgage appears, from the evidence presented, to have been given as collateral. C. Ihmsen, Jr., had no power to make it the consideration of his release. That the mortgage was pledged to the bank by F. L. Ihmsen for his accommodation, rather imposed upon him the duty of redemption to the extent of his interest. The mere fact, then, that the release was made when the verdict was taken, does not establish the fact that the release was based on the verdict. It must therefore be assumed that there was an independent consideration for the release; and that the estate of F. L. Ihmsen, deceased, is entitled to credit at least for the amount bidden at the sale on the mortgage. The notes drawn by F. L. Ihmsen will then be satisfied. It has already been shown that the release to C. Ihmsen operated as a discharge of the liability of F. L. Ihmsen as indorser.

The facts of this case suggest the further question, whether the bank stands in any different relation to the purchased property than if it had taken in pledge, bonds or stocks for the notes held by it, and become their purchaser? It is not a sufficient answer to this question to say that an essential difference lies in this; that in the one case the purchase is made at judicial sale, and in the other at auction. The rule which makes a pledgee's purchase of his collaterals voidable rests, not on the mode of sale, but on the doctrine of trusts; and is the same rule which is applicable to purchases made by executors and other trustees, whether at judicial or other sales: *Story on Bailments*, Section 310; *Whitlock v. Heard*, 13 Ala., 776; *Middlesex Bank v. Minot*, 4 Metc., 329; *R. R. v. Shield*, 3 Brews., 257.

It will be observed that, by the assignment made here, the bank did not acquire an absolute title to the mortgage. The mortgage, which was itself a mere security, was assigned as a collateral only, and was therefore held by a conditional title. The status of the bank was therefore essentially different from that of a mortgagee.

Did the judgment taken on the mortgage nullify the contract and convert the conditional into an absolute title? or was it simply a mode of enforcing the contract? Suppose the amount for which the mortgage was given as collateral was \$18,000, and the bank had sold at sheriff's sale the mortgaged premises for \$35,000, the

amount of the judgment on the mortgage, would the bank have had the right to appropriate the whole proceeds of the sale to its own use? Surely not. The debt for which the mortgage was assigned was not \$35,000 but \$18,000, and the difference consequently must have been paid to the defendant. The contract relation was not then terminated by the entry of the judgment. It would have been within the power of F. L. Ihmsen at any time before the sale to have tendered the amount of the debt and demanded a return of the collateral.

There is then no apparent reason why the rule which is applicable to a pledgee's purchase of his collaterals, should not be applicable here. The right of the bank, when the purchase was made, rested on a mere security which was held by it as collateral. So it would have been had it held, instead, bonds or stocks as collateral, and become their purchaser. There was the same obligation to account for the value of the security because each would have grown out of a transaction of precisely the same kind.

The amount bidden at the sale of the mortgage collateral ought certainly to be no better evidence of the true value of the security than the amount which might have been bidden at a sale on bonds or stocks, would have been of the true value of such bonds or stocks. As F. L. Ihmsen did not pay the debt he was not likely to become a bidder; and strangers, looking to the record, would have been justified in assuming that less than the amount of the judgment on the mortgage would not purchase the mortgaged premises; and if they valued those premises at less than the amount of that judgment they would not bid because it would be useless. But there is no evidence whatever that F. L. Ihmsen had actual notice of the time and place of sale which in sales of collaterals is absolutely essential. It cannot be assumed then that he even had an opportunity to bid or protect himself at the sale. In fact the amount bidden by the bank and at which it became the purchaser, was only about the one-sixth of the amount of the judgment. The natural inference is that the bank was practically without a competitor at the sale. It is not usual for mortgages to be taken for more than the value of the mortgaged premises; and that would be a very extraordinary depreciation which would reduce its value from \$30,000 to \$6,000 within a few years.

In this view it is fair to assume that no injustice will be done the bank in a refusal, as the record now stands, to entertain a further claim on account of the notes held by it. The facts presented raised a reasonable doubt whether the

bank had any just claim here: Story's Eq., 64, note. The claim is not such, therefore, as ought to be enforced in equity. It is but equity to make as a condition precedent to any allowance, the production of satisfactory evidence of actual notice of the sale to F. L. Ihmsen, and that the value of the collateral falls short of the amount of the debt. No such evidence having been offered the claim presented must be rejected on this ground also.

(3.) Jurisdiction to determine the amount of compensation to which an attorney is entitled for collection under a stipulation contained in a mortgage depends on jurisdiction to distribute the mortgage fund. The power to make distribution involves the power to determine all questions which are incidental to such distribution.

That this court has power to direct the sale of the real estate of a decedent divested of the lien of "prior mortgages." *McClure's Appeal*, 37 *Legal Intelligencer*, 308; and that claims presented here are to be treated as "actions." *McBride's Appeal*, 72 Pa. St., 480; *Taylor v. Kelly*, 80 *Id.*, 95, leaves no room for doubt on the question of jurisdiction.

The right to compensation depends upon a necessity for the services of counsel and the fact that such services were rendered. The amount to be allowed depends upon the nature and extent of these services and is a question for the court: *Imler v. Imler*, 9 W. N. C., 196. The facts before the court justify an allowance of two per cent. on the amount of the mortgage presented.

For accountant, J. W. Hall, Esq.

For creditors, Messrs. Jacob H. Miller, T. C. Lazear, J. K. P. Duff and C. F. McKenna.

LICENSE AND EASEMENTS.

How Created and How Lost.—I.

To the Editor of the Pittsburgh Legal Journal:

Our title for the following article will be found inaccurate, as we will occupy a wider field than indicated. This seems to us, however, a necessity in order to fully present the points involved. The task assumed is to construe and describe what interest and rights certain words of a grant convey. The following are the words:

"The party of the first part, for the consideration of one dollar to him in hand paid, has granted and conveyed and does hereby grant and convey unto the party of the second part, his heirs and assigns, the exclusive right to drill, bore, pump and take away all the oil in and under," etc., etc.

"The party of the second part agrees to de-

liver to the party of the first part, one-tenth part of all the oil pumped and produced," etc.

It will be noticed that whatever rights one granted they are without limitation as to time. Their enjoyment is without limit of time or quantity or purpose or person; but an absolute right at all times to take all the oil to any extent he, his heirs and assigns, may deem proper.

This writing has been called indiscriminately a lease—license, grant, easement, an agreement of bargain and sale. Its name may not be important and yet this may aid us in reaching more readily the goal we seek. An easement technically it is not, for it lacks some of the elements of an easement. For instance, there is no dominant tenement to support it for the benefit of which it exists, and the owner of the servient tenement is entitled to profit. The writing is under seal and contains a grant. So far it bears the marks of an easement, but it conveys also an interest in the thing granted—oil.

"A grant of the profits or income or rent and issues or acceptance and profit, or free use, or right to dispose of, or give or sell, or dispose of at will or pleasure, or to do his will therewith, or to be at his discretion, or to be truly enjoyed, are sufficient to pass the title out of which such are to flow or over which such powers are given, where no evidence of the contrary intention is furnished by instrument itself."

Caldwell v. Fulton, 7 Casey, 479;
Reed v. Reed, 9 Mass., 372;
Lefevre v. Lefevre, 4 S. & R., 341;
Swartz v. Swartz, 4 Barr, 353;
Ebner v. Suchler, 7 Harris, 19;
Rerick v. Kern, 14 S. & R., 267;
Fishing Co. v. Carter, 3 Smith, 38.

"An exclusive right to all the coal to be taken out without limitation * * * is a sale of the coal itself, and there is nothing incorporeal about coal:" *Fulton v. Caldwell*, *supra*.

Other authorities to the same effect might be cited, but on this there can be no doubt. The exclusive right to take, use and enjoy a thing is in effect, and practically a grant of the thing itself.

A license it cannot be. The form of the conveyance excludes that. "A license is a privilege or advantage which one may have in the lands of another without profit:" *Big Mountain Improvement Company's Appeal*, 4 Smith, 361. "A charge or burden upon one estate for the benefit of another:" *Morrison v. Morquardt*, 24 Iowa, 35.

An easement and license are both created by writing. The former by deed, the latter never. A writing which if sealed would grant an easement, would without seal transfer only a license,

and this, too, without regard to the consideration:

Morse v. Copeland, 2 Gray, 302;
Ruggles v. Leasure, 24 Pick., 187;
Dyer v. Sandford, 9 Met., 395;
Barlow v. The Railroad, 29 Iowa, 276;
Nall v. The Railroad, 32 Id., 66;
Bombaugh v. Miller, 1 Norris, 208;
Jennett v. Jennett, 16 Barb., 150;
Wheeler v. Brown, 10 Wright, 197;
Washburn's Estates, 9 Goddards, 464.

The distinction practically in this country will be found to exist without much difference. In their enjoyment and use there is no difference, but when we examine them in relation to their liability to be defeated by abandonment, non-user, or notice their dissimilarities appear. A license is said to be revocable at pleasure, yet this statement must be received with caution and with exceptions wider than the rule itself. Hence, in *Dark v. Johnston*, 5 Smith, 164, although this is said to be a license, it is more and therefore irrevocable. A mere license is always revocable, but when coupled with an interest or connected with the grant it is as irrevocable and as solemn an instrument as known to the law:

13 M. & W., 844; 14 L. J. Exch., 164;
Dark v. Johnston, *supra*;
Fink v. Halderman, 3 Smith, 206, 284;
Sanders v. Norward, Cro. & Eliz., 683.

It cannot be a lease, no rent is reserved, and the privileges granted are not for years but for all time—perpetual. In some respects it resembles a license, in others an easement, and in others a lease, and while it is like each in some features it is beyond question more than all together. It conveys to the grantee, his heirs and assigns, on the principle of the cases cited, all the oil in the close described, and the right to take it away at all times hereafter, without limit as to quantity, time, manner of person. No language could confer more absolute and perpetual dominion over and title to the thing granted—oil. The instrument by which this is done is under seal—a deed. True livery of seizen is impossible, but it is true that his is such a grant as it is not necessary. Recording the deed is equivalent: *Caldwell v. Fulton*, *supra*.

"From the date of the agreement to the institution of the ejectment was fourteen years, without any adverse possession of the land for mining purposes; a period quite too short to bar the right or raise the presumption of abandonment:" *Youngman v. Linn*, 2 Smith, 417.

In the following case the real question was: "Is a lease or grant of the oil right for ninety-nine years a corporeal hereditament?" The granting clause was as follows: "Have granted,

sold, aliened, enfeoffed, released and confirmed, and by these presents do grant, sell, alien, enfeoff, release and confirm unto the party of the second part, his heirs and assigns, the undivided two-tenths part of the oil and mineral rights, saving and excepting lead ore." Chief Justice SHARSWOOD says: "There is no reservation or exception of any part of the oil and mineral rights to the grantor, except the lead ore. They were not mere grants of an incorporeal right to dig and take away in common with the grantor to which the principle of Lord MOUNTJAY's case applies:" *Bronson v. Lane*, 10 Norris, 159.

Whatever then this writing may be denominated it is, and it was manifestly intended to be a grant of all the oil in perpetuity—an estate in fee. It is as formal in its declarations and as solemn in its appointments as a deed which conveys values of millions. Oil is as corporeal a substance as coal or land; may be sold and conveyed like land; it is a mineral and part of the realty:

Stoughton's Appeal, 7 Norris, 201, [26 PITTSBURGH LEGAL JOURNAL, 139];

Fink v. Holderman, *supra*;

Dark v. Johnston, *supra*.

In *Stoughton's Appeal*, the question and only question was: Is oil part of real estate? David Rakin as guardian leased the oil in his ward's property to Lambing without the approval of the Orphans' Court. He subsequently made a similar lease for the same oil to Stoughton, which was approved by the court. Both claimed the oil. Hence the question, was the first lease good; if oil is not real estate it is good, but if oil is realty then Lambing's lease is worthless, because not approved as required in cases of real estate. Judge GORDON says: "Oil is a mineral, and being a mineral, is part of the realty. It is like coal or any other natural product which *in situ* forms part of the land. * * * Whenever a conveyance is made of it, whether that conveyance be called a lease or deed, it is in effect a grant of part of the *corpus* of the estate and not a mere incorporeal estate. In the cases above cited this is said to be so as to leases of coal lands for purposes of mining, and there is no reason why the same doctrine should not apply to oil leases."

Judge GORDON it will be observed calls the writing a lease, but he vindicates his opinion that there is nothing in a name by declaring that while he inaccurately calls it a lease, "it certainly amounts to an *absolute sale* of the oil contained in the land described in the *lease*, subject only to the royalty provided for."

J. M. T.

A DESERVED COMPLIMENT.

The Bar of Allegheny County Recommend the Re-Election of Hon. E. H. Stowe, President Judge of Court of Common Pleas, No. 1.

In response to an anonymously signed call, there was held on Saturday last, in room No. 1, of the Court of Common Pleas, No. 1, of this county, probably the largest meeting of the Bar of Allegheny county that has ever been held, the object being to recommend to the people of the county the re-election of the Hon. E. H. STOWE, President Judge of that Court.

The proceedings, which will be found very fully reported below, were characterized by the greatest enthusiasm and good humor, the speeches were all in good taste and the speakers were frequently interrupted by applause. As our space is limited we have omitted some of the humorous passages between the speakers and audience, which it is scarcely necessary to say, were numerous and greatly enjoyed.

The preambles and resolution passed by the Democratic County Committee were heartily appreciated and applauded, and a resolution of thanks voted that committee.

The meeting was called to order at 2 P. M. by ex-Judge FETTERMAN, who moved the election of the following named gentlemen as officers:

Chairman, JOHN H. HAMPTON, Esq.

VICE-CHAIRMEN:

Stephen H. Geyer,	Sol. Schoyer, Jr.,	P. H. Winston,
J. H. McCreery,	W. B. Negley,	H. H. McCormick,
Wm. C. Moreland,	J. H. White,	Thos. C. Lazear,
M. A. Woodward,	Jas. H. Hopkins,	A. L. Pearson,
Wm. McClelland,	Sam'l Harper,	Josiah Cohen,
Wm. Reardon,	J. McF. Carpenter,	Wm. Blakeley,
Geo. W. Guthrie,	W. A. Stone,	H. W. Wier,
J. G. Bryant,	Wm. B. Rodgers,	W. W. Thomson,
C. W. Robb,	M. Swartzwelder,	John Dalzell,
	Robert Pollock,	

SECRETARIES:

W. L. Chalfant,	W. P. Schell, Jr.,	E. Y. Breck,
R. B. Petty,	J. H. Reed,	Geo. H. Woods,
Jno. S. Ferguson,	J. W. Wylie,	Jno. Marron,
T. H. Davis,	W. A. Dunshee,	W. F. McCook,
C. C. Montooth,	S. H. Thompson,	J. F. O'Malley,
Jos. M. Cook,	W. C. Erskine,	W. S. Miller,
Thos. Herriott,	Henry Myer,	Chas. W. Collier,
	Wesley Grier,	

On motion of W. D. Moore, Esq., the chairman appointed the following

COMMITTEE ON RESOLUTIONS:

W. D. Moore,	T. M. Marshall,	D. T. Watson,
John Barton,	J. K. P. Duff,	Geo. Shiras, Jr.,
F. M. Magee,	Jacob H. Miller,	Chris. Magee,

S. A. McClung,	C. S. Fetterman,	Jas. C. Doty,
W. A. Lewis,	D. D. Bruce,	Malcolm Hay,
D. F. Patterson,	R. B. Carnahan,	Jno. Coyle,
Jno. C. Newmyer,	C. F. McKenna,	W. S. Purviance,
C. C. Taylor,	H. S. Floyd,	J. W. Donaldson,
	Jno. S. Lamble.	

The committee reported the following minute, prepared by Mr. Moore, for the action of the meeting:

The Bar of Allegheny county, without distinction of party, and with no purpose except to promote the pure and impartial administration of the law, unanimously recommend to the people of this county, the re-election of Hon. EDWIN H. STOWE, to the office which he has so long held to the advantage of the public, and to his own honor.

Among the distinguished gentlemen with whom he has been associated on the Bench, and who have made the record of the judiciary a credit to our whole community, he has been conspicuous for his courage, integrity and impartiality in the discharge of the duties of his high and responsible office. For nearly twenty years we have been associated with him personally and professionally, and we desire to say, and do say, without any dictation or the assumption of any special right to advise, except what grows out of our professional relations, that into no hands would we more confidently and gladly commit the life, liberty and property of this community, and largely they are in the power of the court.

A wise, learned and just judge is the safeguard of them all, and once secured should be retained.

After the reading of the minute D. D. Bruce, Esq., spoke as follows:

MR. CHAIRMAN:—Before passing on this admirable minute, prepared by the committee, I think we ought to pause a moment and hear some expression of opinion on the man we seek to honor, from the members of the Bar present at this, one of the largest meetings of the Bar ever held in this county; a meeting representing all shades of political belief, called for the purpose of bringing before it the name of a judge for whom we all have the same kindly feeling, for whom we all entertain the highest respect and esteem. If this was the occasion of the death of a man like Judge STOWE, we would expect to hear speeches eulogizing his life and character, and they are no less appropriate now, met as we are, to pass resolutions indorsing a man in full life, and to give the stamp of our approval, as members of the Bar, to his coming before the community for re-election to the office he so acceptably holds. I think that in addition to this admirable minute, prepared by Mr. Moore in his usual elegant style, utterances, should come from the mouth of every man who can speak, testifying to the community what we think of Judge STOWE. It appears to me very appropriate and worthy of remark and notice at our hands that but a few moments ago, in another corner of this Court-House, a committee composed of the leading gentlemen of the Democratic party should have passed a resolution expressive of their desire for the retention of our honored judge in his present position; that they should have said to the people of the county, in advance of this meeting, "Here is a man worthy of your unanimous suffrages," and I think we would be derelict in our duty, having a more intimate connection and acquaintance with him, did we let the opportunity pass to express ourselves individually, and to each give to our clients and the people at large a certificate of Judge STOWE's fitness for the position.

How appropriate such a tribute is to Judge STOWE! There is not a man who has practiced law before him

who does not like him. He is remarkable as a lawyer, judge and man. You meet your brother lawyer in this court-room on Saturday morning or any day and you perhaps have some business to transact with him. Some lawyer is addressing the judge while a dozen or more of us are talking together on business—perhaps some one is telling a story [laughter]—and we are all making more noise probably than we ought to, but his mind is of that character and that strength that he can concentrate it on what is being said by the lawyer addressing him, and he does not notice our talk further than to say sometimes, "Don't speak so loud, I can't hear the gentleman." I fancy sometimes that he looks down at us with a sort of longing on his face, and if he should speak, would say; "I have anticipated this man and know what his point is, and I would like to get alongside of you and hear the cream of that joke!" He is hard of hearing when we are enjoying ourselves, and I believe that is the only defect he has. [Laughter]. He hears the gentleman who addresses him, but he don't hear us. We can find quiet enjoyment and rest in this room; we don't feel under restraint when we come in here, as if we were watched and would be called to order if we indulged in any fun amongst ourselves.

Then it is a pleasure to try a case before Judge STOWE. We sit here with our minds upon the witness, our client at our ear, looking occasionally at the jury, as you, Mr. Chairman, know very well how to do. [Laughter and Applause.] and entirely forget who is sitting on the Bench, and yet all the time we feel as if there was a legal providence hovering around us that keeps us in the right path in discharging our duty. That is the kind of man for a judge. Judge STOWE lets a lawyer try his case, and he sits as the judge, to administer justice, and don't help one party to the injury of the other. He is "a brave man" the minute says. Yes, he is, and when we have such a man on the bench, a man who has had experience for twenty years, who we all know is able to retire to private life, yet hangers so to do his duty that he won't neglect it for a moment, but will come day after day to administer justice with a fair hand between the people; why shouldn't we say, as Democrats and Republicans, let the people all vote for him? [Applause].

D. T. Watson, Esq., spoke next, and said:

MR. CHAIRMAN:—I don't intend to make any remarks on this minute, but I think it my duty, and I think it the duty of every lawyer who has practiced before Judge STOWE, to say that he deserves a re-election at the hands of the people; that he deserves their votes, irrespective of party, and to say to them emphatically that so long as we keep him on the Bench we will have, what he has been for the last fifteen years to my knowledge, an upright judge, one of the ablest judges so far as I know, that we have ever had in Allegheny county. [Applause, and cries of "good."]

R. B. Carnahan, Esq., said:

MR. CHAIRMAN:—It is but a moderate, and perhaps inadequate commendation of Judge STOWE, now in the nineteenth year of his service as a judge in this court, to say that he has been and able an upright judge, and that his administration of justice has been satisfactory to the people. It has been eminently so. In passing this minute we give him a testimonial of value. It is one of which he may well be proud, for I think it rarely happens that a judge has sat on the Bench for nearly twenty years without making some enemies, without doing some things which might be misapprehended, perhaps to his disadvantage. I have never heard a remark that would lead me to think there is one member of this Bar who does not favor his re-election. [Applause].

Malcolm Hay, Esq., spoke next, as follows :

It is utterly impossible for all of us to give utterance by our voices to our sentiments on this occasion. There is certainly no difference of opinion amongst the members of the Bar on the question of the re-election of Judge STOWE, and as it is impossible for all of us to speak, it seems to me that apart from the adoption of this resolution the most appropriate thing we can do is to prepare a paper, to which all the members of the Bar can attach their signatures, to be handed to Judge STOWE as a permanent token or our appreciation of his services, and of our respect and regard for him.

Mr. Hampton announced that as soon as the resolutions were engrossed an opportunity would be given to all the members of the Bar to sign them.

George W. Hazen, Esq., was the next speaker, and said :

MR. CHAIRMAN:—As one of the very young members of the Bar I would like to say a word about Judge STOWE. His eminent judicial ability and integrity needs no comment from us. His positiveness of character, the promptness with which he rectifies any mistake he may make, commends him to the esteem and admiration of all, while his kindness, indulgence and courtesy to the young members of the Bar noticed as it is, and commented on frequently, commends him especially to them. [Applause].

Mr. Moore read the following preambles and resolution which he said had just been received from the Democratic County Convention, which was in session in another room of the Court-House :

WHEREAS, Since the organization of the Democratic party it has been a part of its creed to keep the Judiciary out of and above politics; and

WHEREAS, The term of E. H. STOWE, President Judge of the Common Pleas Court No. 1, will expire this year, and

WHEREAS, Judge STOWE possesses a fitness for this position that is universally acknowledged, and entitles him to a unanimous re-election, and further, in view of the fact that the Democratic County Convention, ten years ago placed his name on the ticket then formed, and voted for by Democrats, therefore.

Resolved, That this committee recommend to the Democratic County Convention, to be held this year, the propriety of making no nomination in opposition to Judge STOWE for President Judge.

A. Blakeley, Esq., spoke next, saying :

MR. CHAIRMAN:—I have heard some remarks on the propriety of holding a meeting of this kind, but I think when a judge has served nearly twenty years upon the Bench and obtained the good will and universal respect of all men of all parties, by his calmness, fairness, integrity and ability, that the members of the Bar who practice before him should meet and make a declaration such as contained in the minute offered by the committee. I am gratified that by the action of the Democratic County Convention, just read, the question of his re-election has been taken out of party politics.

The Chairman of the meeting, Mr. Hampton, spoke next, saying :

GENTLEMEN OF THE BAR:—I would be untrue to my-

self if I did not bear willing testimony to the ability and integrity with which Judge STOWE has discharged his duties. Years ago I met him at college, and was his room mate. Afterwards he read law with the late Judge HAMPTON. After Judge STOWE was admitted to the Bar it was my good fortune to read law with him, and the longer I have known him, as the years have gone on, the closer I have been drawn to him. I respect and honor him as a man of unsullied reputation. No man, I venture to say, in this community ever heard Judge STOWE's integrity of purpose as a judge questioned. He possesses the rare elements that go to make up the judge. He has a good strong body, the motive power for his brain; he has a well stored intellect. He studies every case that comes before him and studies it carefully. If he makes a mistake, for judges and lawyers do sometimes, [laughter] he quickly and willingly corrects it. He has none of that persistent adherence to an opinion once expressed that some judges have, but is always ready to right himself when wrong. Then, too, he keeps up with his profession. A lawyer who in the trial of a case of importance before him eltes an authority on any point, will usually find him familiar with it, and if the case be well prepared on the law and facts he will find a judge who thoroughly comprehends it, and I will venture to say that, without any exception, whoever sat on the Bench, no man in Allegheny county could make a more lucid and forcible exposition of the principles of law underlying a case to a jury, or a more fair and impartial presentation of the facts than Judge STOWE can and always does.

A. M. Watson, Esq., (interrupting). And he will give you an exception to his charge. [Great laughter].

Mr. Hampton. And he always gives Mr. Watson a general exception to his charge. [Renewed laughter]. And my friend Mr. Bruce, although he poured out his whole heart here for Judge STOWE, (and he has a great big heart), I have no doubt has, like the rest of us, when the judge has decided against him, put his hat on and gone out of that door saying the court had gone wrong, [great laughter], but afterwards found that the judge was right. Judge STOWE has been on the Bench about nineteen years, and whether on the civil or criminal side of the court, has always faithfully discharged his duty, and it is a high compliment to him—to any man—to have the indorsement of such a Bar as this, which has not its superior, if equal, in Pennsylvania, and it is also a high compliment that the people of a county like Allegheny, who have hundreds of millions of money invested in all kinds of manufacturing pursuits, as well as those who are dependent on our industries for their daily employment, should, without respect to party, unanimously indorse him as fit to preside for the next ten years in the court he has long honored by his pure and able career as a jurist. It is worthy the ambition of any man, old or young, to struggle and strive for years to gain such an honor as that, and it is a noble example he has set to all the members of this Bar, and to the lawyers of this State, showing as it does, what persistent industry, unwearyed devotion to duty and spotless integrity can do. [Applause].

The minute presented by the committee was then put before the meeting and carried by acclamation.

On motion of W. D. Moore, Esq., the following resolution was unanimously adopted and the meeting then adjourned :

Resolved, That we return our thanks to the Democratic county committee for their kind courtesy in passing the resolutions which have been read here, and that the resolutions be incorporated in the minutes of this meeting.

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PITTSBURGH, PA., FEBRUARY 1, 1882.

Supreme Court, Penn'a.

SAMUEL McLAIN v. The COMMONWEALTH.

Short-hand notes of the testimony of a witness taken upon a coroner's inquest, at which one afterwards indicted was present in custody,—such notes not having been put in writing by the coroner, nor by his authority, nor certified, nor returned by him,—are not admissible for the defendant on the trial of such indictment, though at the time of such trial, the witness was sick and unable to travel.

The Commonwealth is not bound to establish an adequate motive for an alleged crime. The inability to discover the motive does not disprove the crime.

It is not error to submit for the consideration of the jury accompanied with the instruction that evidence of good character of itself may create a reasonable doubt, the language of Chief Justice SHAW, in the Webster case, "where it is a question of great and atrocious criminality * * * evidence of good character must be considered far inferior to what it is in accusations of a lower grade."

If a jury be satisfied of its truth, they may lawfully convict upon proof of the existence of human blood by the testimony of unlearned observers.

Error to the Court of Oyer and Terminer of Allegheny county.

Samuel McLain was indicted jointly with Samuel Geisel and Theodore Gross, but tried separately for the murder of a lad, named Samuel Hunter. The deceased was one of a number of boys and youths employed as drivers by Michael (the father of Samuel) Geisel, in hauling in connection with the Edgar Thomson steel works, near the borough of Braddock. The carts, horses and mules used by him were the property of Michael and were kept at a stable (about five hundred yards distant from the Monongahela river), of which his son and McLain had the care and control. It was the practice of the drivers in the evening, when the whistle at the works was sounded for six o'clock, instantly to quit work, where they might chance to be, hasten to the stable, water and cleanse their horses and mules, at a trough provided, take them into the stable, remove the harness, and hurry homeward.

On the evening of the 5th of March, 1879, at the sound of the whistle, the drivers hurried to the stable as usual, and among them came the

deceased, riding his mule, and carrying his dinner bucket. The lad took a tumbler and other contents out of his bucket, and with the latter commenced to throw water upon the mule's legs. Michael Geisel, called for the defense, states that he was at the trough when Hunter came in, greasing the sores upon the stock; that he greased the mule driven by the lad; that his mule was the last; that Hunter made an attempt to wash his mule, by dipping his bucket into the trough and pouring the water on the mule's legs; "and I says 'you are a little late, don't mind washing, just put him in;'" and that he went into the stable when I ordered him. He was seen in the stable, but was not seen by any one to come out and go away, nor was he afterwards seen elsewhere alive.

Within less than thirty minutes after the drivers left the stable, the body of Hunter was found in the river, close to the beach, with a fatal wound above and behind the left ear, where a triangular piece of the skull had been driven in, seemingly by two blows, and with several gashes upon the face, cutting through the flesh and into the bones.

It appears that on this day, by reason of a sore, the deceased wore upon one foot his own shoe, and on the other his mother's morocco shoe with a high heel. That night, after the discovery of the body, the father and others, in more than one party, thoroughly and somewhat systematically searched the ground between the stable and the river to discover if possible marks of the footsteps of the boy and signs of a struggle. Nothing of the kind could be seen anywhere, save that the father discovered the footsteps of deceased at the trough, near the stable. There was an eddy in the river, where the body was found, but neither in the water, on the beach nor between the river and the stable were any signs of blood seen.

The stable and stall, in which the mule, driven by deceased was kept, were also examined for signs of blood, but none were found. A few days later the cinders on the floor of the stall were taken out, and examined, as were also the contents of the manure pile, but without result.

On the second day after the death, the County Detective, Peter Dressler, went to the stable and there met McLain. He told defendant that he wanted to look for shovels. McLain replied that the detectives had taken them all away. Mr. Dressler told him he would look and satisfy himself, and while McLain was getting a light to assist him in his search in a corner the detective placed his hand upon a shovel and said

to McLain, here is a shovel, to which the latter replied, yes, he didn't think about this old shovel. Upon or near the edge of this shovel were spots and a large spot upon the back. These were seen within a few minutes by another officer and by two physicians. These three and Mr. Dressler believed these spots to be blood, and the physicians believed the large spot to be blood and brain matter. Along the edge of the shovel were also found hairs believed to have been human hairs, and which two physicians, with the aid of a small magnifying glass, compared with hair taken from the head of deceased and from the piece of skull found in the brain and found to correspond in color and size.

Matter taken from the shovel was examined by the aid of the microscope. One physician testified that he found corpuscles of human blood in the matter examined, and two or more failed to find evidence of blood.

Two physicians, who made a *post mortem* examination, and another who saw the body, testified that the wounds on the deceased could all have been made with the shovel, found in the stable, and the first two, that the long wounds on the face could not have been made with a hatchet. One physician, who had seen the body, called by the defense, swore that the wounds could not have been made with the shovel, but were probably made with a hatchet, and others who had not seen the wounds, and whose attention was not called specially to those on the face, stated that the wounds were likely made with a hatchet.

A witness, who had crossed the river in a skiff, when walking up the bank, about fifteen minutes before the body was found, heard a scream from across the river, which without looking around, he thought came from the place where the body was discovered.

Before 8:30 on this evening, two men were seen carrying a parcel or burden from the direction of the stable towards the river, each holding one end. The witness described the men, their coats and the covering of their heads; all of which bore a general resemblance to McLain and Geisel; and at the inquest pointed out McLain as very much like one of the men by the appearance of his back.

Two men were seen, a few minutes before the body was found, near the spot, who ran away upon the approach of a skiff.

All the persons indicted were at the stable when the drivers came in on this evening. A younger brother of deceased, about the time the last of the drivers must have left, was told as he went to the stable by one of them whom he met

coming thence, that his brother was still there, and went thither to help him as he had done before. As he approached the stable, where deceased kept his mule, Geisel came to the door, and upon seeing witness made a gesture and McLain also came forward. As witness proposed to enter, saying he wished to help his brother, Geisel said, "never mind; he is in there; he is paid for that;" and witness went away.

On different days after the 5th, (the river having fallen in the meantime) the cap of the deceased, uncut and unstained with blood, the parts of his dinner bucket, and the tumbler which had been in it were found at and in the river, near where the body lay, and last of all, a hatchet was found in the river near the spot.

A *nol. pros.* having been entered as to him, the Commonwealth called Theodore Gross. This witness was probably about eighteen years of age, a thorough negro, dull-witted and unusually ignorant. At this time his employer occupied a farm, upon which the stable was located, and in part of which Gross worked as hostler.

His account was given in these words: "The old man Geisel was pumping water there, and Sammy Hunter came in to the watering trough with his mule, and started to wash his mule's legs off with a dinner bucket; the old man Geisel says, 'never mind, Sammy, take him into the stable;' Sammy took him into the stable and old man Geisel started for a train, and then I seen McLain go into the stable with a shovel, and hit Sammy Hunter twice, and Sammy Hunter fell; then I seen young Geisel hold the bag, and old man McLain put him into it, and then I seen McLain sling him on to his shoulder and carry him out of the door, and then turn down along that fence; then they went up over the railroad and down on the other side; then kept straight on down, and then turn down that hollow, and along the whole way down that hollow; after he got down that hollow and down the river bank, I couldn't see no more of him."

He further stated that when he saw McLain enter the stable he went from where he had been standing to the door (the only mode of lighting that part of the stable), and while standing there saw what he detailed; that but two blows were struck; that not a word was spoken by McLain, Geisel or the lad, while he was there; that nothing was put into the bag but the body, and that McLain carried it all the way to the river on his shoulder. The route designated by Gross was some considerable distance from that described by the witness who

seen the men with the parcel going towards the river.

For the defense it was proposed to read the short-hand notes of the testimony of one James Cox, taken at the inquest. The facts upon which this was refused, sufficiently appear in the opinion.

The defense called physicians to show that from the nature of the wounds, on the deceased, blood would almost certainly be cast in quite large quantities, and to considerable distances, about the place where the wounds were inflicted; that if the body had been carried as described by Gross, McLain's coat would have been saturated with blood, and traces would have been found along the route; and that as to microscopic or other scientific investigation of blood stains, it is impossible by any known means to distinguish human blood from that of many animals, and that the eye cannot discriminate between stains of human blood and those of any other blood, or those made by many other substances. To the latter point, they also cited medical works and papers. McLain's clothing was carefully examined, and though a few small stains appeared upon it, the examination was without result.

On cross-examination Gross denied that he had told his story differently before the inquest; that in jail he had declared the defendant was guiltless, and that he had given certain reasons for his first account to the coroner; and the defense called witnesses to contradict him in each of these particulars; they also claimed that he was contradicted by the drivers as to deceased being the last boy to come with his mule to the trough at the stable.

Witnesses were also called as to defendant's reputation for peace and to the effect that Gross could not have seen any one passing over the route from the stable to the river, designated by him; that Geisel was at his boarding-house as early as 6:40 on that evening; and that two rows of houses, all occupied, in the near neighborhood, overlooked the stable door and the alleged route to the river.

Michael Geisel swore that he was at the stable until 6:28 o'clock, and that before he left, the stable was closed up, and all the drivers gone; and that McLain's young son had been there from early in the afternoon and was there with his father when the witness left. The boy testified to the same effect and that he went home with his father that evening.

Among other rebutting evidence the Commonwealth's witnesses testified that McLain's boy did not go home with him on that occasion. There was a great deal of other evi-

dence—the trial (at which BAILEY, J., presided) occupying three weeks and the testimony, when printed, covering nearly nine hundred pages. The principal assignments of error are specifically noticed in the opinion and the remainder of the twenty-four are covered by its last paragraph.

For the prisoner, *Messrs. Thos. M. Marshall, W. D. Moore, H. H. McCormick and William Scott.*

For the Commonwealth, *District Attorney John S. Robb and M. Swartzwelder, Esq.*

Opinion by MERCUR, J. Filed January 3, 1882.

All the specifications of error argued were properly presented under a few heads, and will now be so considered.

The first is to the rejection of the testimony given by James Cox before the coroner on the inquest. Cox was shown to be ill, and although convalescent at the time of the trial, yet unable to attend court.

It is undoubted law that the testimony of a deceased witness given on a former trial between the same parties in the same issue, and duly proved, is admissible in a civil case. The authorities are not in entire harmony as to the application of the same rule in criminal cases. The preponderance of authority is that the rule does so apply, if the witness be dead: 1 American Crim. Law, § 667; 1 Whar. Law of Ev., § 177; *Commonwealth v. Richards*, 18 Pick., 434; *Crary v. Sprague*, 12 Wend., 41; *Brown v. Commonwealth*, 23 P. F. Smith, 321.

The witness, Cox, was not dead, nor was his sickness of a character imposing permanent disability. On the contrary he was recovering from typhoid fever. So there was reason to suppose he would be able to attend on some future day to which the trial may have been postponed. In civil cases, the recognized rule in this State, is to admit the testimony of a witness, unable to attend court, without regard to the permanency of his sickness; yet we are not aware that the precise point has ever been decided by this court in a criminal case. Under the rule declared in *Harrison v. Blades*, 3 Camp., 458; *Jones v. Brewer*, 4 Tann., 47, and Whar., Law of Ev., § 179, the evidence of a witness temporarily ill would be excluded in a criminal case. It, however, is not necessary to invoke that distinction in the present case. The action of the court rests on firmer ground. The hearing before the coroner was not between the parties to the issue in which the evidence was offered. No issue was there formed between the Commonwealth and the plaintiff in error.

An inquiry there takes a broad range. It is not to ascertain the guilt of any particular person, but of every person that the evidence might implicate. No technical rules restrict or control the admission of evidence. No cross-examination of witnesses is had. The coroner's discretion makes the line where the evidence of a witness shall begin and where it shall end.

It was contended that the evidence should have been received under the British Statutes, more especially under the 1 and 2 Phil. & Mary. and the construction given thereto. Chap. 13 Section, 5 of that statute does require the coroner in inquisitions finding murder or manslaughter, to put in writing the effect of the material evidence given to the jury before him, and to certify and return the same with the inquisition, thus making it a part of his judicial action. When so taken, certified and returned, and the witness be dead, the courts in England have held the evidence admissible.

Our attention has not been called to any Pennsylvania authority giving such construction to the statute. If, however, it were otherwise the rule could not apply to this case, as the witness is still living. Other reasons exist for its exclusion. The testimony offered was not taken down by the coroner nor under his direction or supervision. Nor was it certified or returned by him with the inquisition. It was taken by a short-hand writer at the instance of of some person not clearly disclosed by the evidence and as testified by the writer for, "whom-ever it might concern."

It is further urged that the evidence should have been admitted under the ruling, on the trial of Lord MORELY, reported in Kelynge, 53. 18 Chas., 11. It was then resolved "that in case any of the witnesses which were examined before the coroner were dead or unable to travel and oath made thereof, that then the examination of such witnesses might be read, the coroner first making oath that such examinations are the same which he took upon oath without any addition or alteration whatsoever." This was the case in which Lord MORELY and BRUNSWICK were indicted for the murder of Hastings. The former was tried by his peers before the Lord High STEWARD; the latter before the court of Kings Bench: Levings Reports, part 1, page 80, and again reported in 2 Keble, 19. In such case it was shown that the witnesses were dead when their testimony was offered. The admission of the evidence did not rest on any temporary disability but on their death, and the sworn testimony of the coroner as to the correct taking of the evidence offered. As the testimony of Cox was in no

manner proved by the coroner, the present case does not come within those authorities under the broadest rule there indicated. Nor does the case of *Brown v. Commonwealth*, make the evidence admissible. There the testimony of the witness was taken before a justice of the peace, on a hearing wherein Brown was charged with the crime. He was present and represented by counsel. Full opportunity was thus given for cross-examination of the witness. The accused had "met him face to face," and the witness was dead when his evidence was offered on the trial. The evidence given by Cox was properly rejected.

Gross was the only witness who testified to having seen the accused commit the murder, although there was much other evidence tending to corroborate him. If Gross was believed the guilt of the accused was established. It was therefore of vital importance to the accused to cast discredit on the testimony of this witness. Evidence was given, which, if believed, was very proper for the jury to consider in determining the credit to be given to Gross. It consisted, in part, in showing that his testimony was contrary to his previous statements; that the number of cuts found on the head of the murdered boy proved the infliction of more blows than Gross swore were struck; that other evidence proved he could not have been killed in the stable at the time and in the manner testified to by Gross. All the substantial contradictions to the evidence of Gross were fully, distinctly and fairly called to the attention of the jury, and they were well instructed in regard to believing that only which carried conviction to their minds.

It was further urged that no adequate motive was shown to induce the accused to commit the crime charged. The court well said the Commonwealth was not bound to establish an adequate motive for the alleged crime, and declared in the words of this court, "the fact of murder being established the inability to discover the motive does not disprove the crime."

The fact that Hunter was murdered was unquestionably proved. The only contention was whether the accused committed the act. He gave evidence of a previous good reputation. The instructions of the court gave due weight to this evidence. It said: "Evidence of good character, when proven to exist, is not a mere make weight thrown in to assist in the production of a result that would happen at all events, but it is positive evidence. A case may be so made out that no previous character, however good, can make it doubtful; but there may be cases in which evidence given against a person

without character would amount to certainty, in which a high character would produce a reasonable doubt, or, indeed, actually outweigh evidence which might otherwise appear conclusive."

The learned judge then submitted for "their consideration" the language of Chief Justice SHAW, in the case of Prof. Webster, "Where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience, it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating on the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusation of a lower grade." After reading this he added that such evidence "may, of itself, by the creation in your minds of a reasonable doubt of the existence or truthfulness of the criminating evidence, cause you to acquit the defendant." We are not prepared to dissent from the doctrine declared by Chief Justice SHAW; but qualified as it was by the court below, the accused has no just cause of complaint.

Error is alleged in regard to the manner in which the court submitted the evidence, proving the finding of the human blood. Gross testified that the murder was committed with a shovel. Stains or discolored spots were found on the shovel and also on the clothing of the accused. These were submitted to chemical analysis and microscopic examination by different experts. Some succeeded in finding well defined blood corpuscles, indicating human blood, others failed to find them. It was contended on the part of the accused that human blood could not be distinguished from that of many animals by any chemical test or scientific appliance. In answer to this the court substantially said if scientific research gave no aid in the discovery of heinous crime it was deplorable. Nevertheless he charged, that "if the jury was satisfied of its truth, they might lawfully convict, upon proof of the existence of human blood by the testimony of unlearned observers." The correctness of this view is fully sustained by *Gaines v. Commonwealth*, 14 Wright, 319. That was a case of homicide, and the court below said to the jury: "We cannot instruct you that because no analysis had been made of the substance which the witnesses supposed to be blood, no chemical test, no microscopic examination, that you are therefore to reject the evidence as insufficient to show that it was blood. We feel it to be our duty to refer the question to you,

and leave it for you to say whether the Commonwealth has satisfied you beyond a reasonable doubt that the spots seen by the witnesses were blood." The correctness of that ruling was affirmed by this court.

The evidence on each side was sufficiently brought to the attention of the jury and the facts fairly commented upon. There was no error in presenting some of them in the form of questions. It was well calculated to present to their consideration the precise points in controversy. The facts were well stated in a clear and impartial manner. The evidence of the experts and the positive and negative testimony of each was fairly contrasted. The contradictions and improbabilities of much of Gross' evidence were fully stated. It is not necessary to refer to the various assignments more in detail. We have examined all of them. The court very carefully and correctly instructed the jury that they were the judges of the credibility of witnesses, and as to the weight they should give to the opinion of the court on questions of law. The case was well tried and with due regard to the rights of the accused. We find no error in the record.

Judgment affirmed and it is ordered that the record be returned for due execution of the sentence.

SELHEIMER v. ELDER.

A claim for unliquidated damages against a railroad company for taking land is not within the attachment laws.

Error to the Court of Common Pleas of Mifflin county.

Feigned issue between J. B. Selheimer, assignee of George Saylor and G. W. Elder, assignee of Kirkpatrick, Kinsey & Co., to try the title to money paid into court by defendant in No. 19 November Term, 1876, George Saylor, for use of John B. Selheimer, against the Sunbury and Lewistown Railroad Company.

The facts in this case were not disputed, and are these: The Sunbury and Lewistown Railroad Company was duly incorporated, commenced their road and located it over the land of George Saylor, in Mifflin county, Penn'a, in 1870; made the road, and commenced operating it in 1871.

The company entered and occupied Saylor's lands without giving a bond.

Kirkpatrick, Kinsey & Co. obtained judgment against George Saylor to No. 55 November Term, 1870, for \$205.24, with interest, 25th October, 1870, which was transferred to George W. Elder, Esq., and an attachment execution issued

by the latter to No. 32 January Term, 1872 (Mifflin county), to which the sheriff returned as follows:

"Served the within attachment execution on George Saylor, defendant, personally, by handing him a true and attested copy, and making contents known, December 16, 1872. Also served a true and attested copy, personally, on J. H. T. Jackson, secretary of the S. & L. R. Co., and made contents known to him in presence of James S. Galbraith, and summoned said Sunbury and Lewistown Railroad Company as garnishees, and attached all debts, moneys or effects due or owing to said George Saylor from the said railroad company in the hands of the said Sunbury and Lewistown Railroad Company, December 15, 1872."

Sometime in May, 1874, the Sunbury and Lewistown Railroad Company's road was sold in due form of law by the creditors of the same, purchased by parties who reorganized about the 1st of February, 1876, as the Sunbury and Lewistown Railway Company, and have ever since caused the road to be operated.

On the 1st of September, 1876, George Saylor assigned his claim for damages against the railway company to John B. Selheimer, and he is now claiming under said assignment against the attachment issued by Elder on the Kirkpatrick-Kinsey judgment.

Under this state of the facts proceedings were had under the law to assess the damages done to the property of the said George Saylor by the location of the said railroad, and a jury of viewers reported \$493.34, with interest from 26th of October, 1877, which money the said Sunbury and Lewistown Railway Company has paid into court, and this issue was framed to determine whether Elder, the attaching creditor, or Selheimer, the assignee of Saylor, is entitled to the money.

Verdict and judgment for defendant.

Plaintiff took this writ, filing, *inter alia*, the following assignment of error:

2. That the fund in dispute in this case is not subject to an attachment, the claim being for unliquidated damages, as a penalty for a trespass or tort. The original claim was against the Sunbury and Lewistown Railroad Company; our proceeding was against another company.

Opinion by PAXSON, J. Filed October 3, 1881.

This record presents a number of questions that need not be discussed. The case turns upon the point raised by the second assignment of error, viz., that the fund in dispute is not the subject of attachment.

The fund sought to be reached by the attach-

ment was a claim by George Saylor against the Sunbury and Lewistown Railroad Company for entering upon and taking a portion of his land for railroad purposes. The company entered and took the land without any agreement with Saylor as to the price, and without having filed a bond as required by Act of Assembly.

We are of opinion that this claim is of such an uncertain and speculative character that it does not come within our attachment laws. There was no contract relation between Saylor and the railroad company. On the contrary, the claim is for unliquidated damages for a tortious act. Such a claim has never been held to come within the attachment laws. It was said by THOMPSON, J., in *Girard Fire Insurance Company v. Field*, 9 Wright, 133: "We cannot come to the conclusion that every unliquidated claim is without the reach of attachment process. The reason for the exception was sufficient ground to operate on in the exclusion from it of such claims as are contingent, and such as present no fixed standard for liquidation, like torts or damages for breach of contract. * * * They want tangibility, and are not attachable, nor would they be the foundation for the process." Even when the claim arises from a breach of the contract, it cannot be attached unless the damages can be reduced to certainty by a definite standard; not where they are speculative or incapable of being ascertained by a fixed standard: *Carland v. Cunningham*, 1 Wright, 228.

In the case in hand there is no fixed standard by which the damages can be liquidated. They are purely speculative. There are a large number of questions to be taken into consideration in ascertaining the damages in such cases, which will readily suggest themselves to the professional mind. Moreover, the damages could not be liquidated in this proceeding. The attaching creditor could not try the question of the damage to Saylor in his attachment suit. Such damages can only be assessed in the manner designated by the Act of Assembly. The attaching creditor has no standing to petition for a jury. The owner of the land might not do so. He has his remedy by ejectment, and may prefer to pursue it.

It was said, however, that the attachment bound after the damages had been liquidated by the award of the jury. The obvious answer to this proposition is, that Saylor assigned his claim to Selheimer before the award.

We need not pursue the subject further; it is too plain.

Judgment reversed and venire facias de novo awarded.

Court of Common Pleas, No. 1.

ANDERSON v. NICHOLS & MILLS.

Neither the rules of this court nor the practice justify or permit the filing of a supplemental affidavit of claim for the purpose of obtaining judgment.

A supplemental affidavit may be filed under Rule VIII, for the purpose of evidence on the trial, but the court will not inquire into the sufficiency of it or of the defendants' reply thereto on a rule for judgment.

Rule for judgment for want of a sufficient affidavit of defense.

Opinion by STOWE, P. J. Filed January 16, 1882.

The plaintiff on July 30, 1881, filed with his *precipe* an affidavit of claim, under Rule IX, in reference to affidavits of claims and defense, which was entirely insufficient under said rule to entitle plaintiff to judgment. On October 14, 1881, the plaintiff filed with his *narr.* another affidavit under Rule VIII, Sec. 1, in reference to admission for the purpose of evidence, of which notice was given defendant, and in reply, Mills, one of the defendants, filed a supplemental affidavit of defense, and now plaintiff moves for judgment upon the ground that said affidavit does not set out sufficient defense.

If the plaintiff's second affidavit had been filed with his *precipe*, it is quite possible that we might have concluded that he was entitled to judgment under Rule IX, but even if this is so, we have no right under our rules to do so now. Neither our rules nor practice justify or permit the filing of a *supplemental* affidavit of claim for the purpose of obtaining judgment. It may be done under Rule VIII for the purpose of evidence on the trial, but we cannot, when so filed, inquire either its sufficiency or that of the defendants' reply to it, upon rule for judgment.

Rule discharged.

Court of Common Pleas, No. 2.

W. H. MAGILL, Executor of JOHN MAGILL, Deceased, v. GEORGE C. MAGILL.

It is not a good defense to a suit on a bond that the defendant alleges that the legal plaintiff, who has no interest in the bond, has not authorized the institution of the suit.

If the defendant wishes to take advantage of Rule of Court 103, he should move for a judgment of *non pros.* In default of the use plaintiff being named on the record.

The affidavit of defendant, not discharging a defense on the merits, the court will not be astute in searching for a technical defense.

Action of debt on a bond, dated November 21, 1874.

The affidavit of claim set forth that George C. Magill was "bound unto John Magill in the sum of \$6,000, to be paid to said John Magill, his certain attorney, heirs, executors, administrators or assigns," conditioned that said obligor pay to "said John Magill, his certain attorney, heirs, executors, etc., \$3,000 in manner as follows, viz., to the heirs of the said John Magill, as provided and mentioned in his last will," etc., dated November 16, 1874. John Magill's will provides that George C. Magill shall pay legacies, amounting to \$3,000, to certain persons therein named. The condition of the bond was not performed.

Affidavits of defense set forth (1) that plaintiff has no standing in court; (2) that plaintiff has not authorized the bringing of this suit; (3) that plaintiff as executor had not paid the debts of John Magill's estate, nor filed any account showing the amount of said debts, and that until they are ascertained and paid defendant cannot know what amount of the money secured by the bond will be left to be applied as directed in said will; (4) that the "agreement was that affiant's liability should be confined to property described in a mortgage given to secure bond here sued on;" therefore, lien of any judgment in this suit must be restricted to said property.

Rule for judgment for want of sufficient affidavit of defense.

For the rule, *Wm. Yost, Esq.*

(1) The suit is properly brought in the name of the executor, who is a trustee and in whom the legal title and interest (and hence the right of action) is vested: *Chit. Pl.*, 16th Amer. Ed., p. 3; see *Sanders v. Filley*, 12 Met., 554. (2) Being such trustee the plaintiff's consent to the use of his name need not have been asked. (3) Defendant's liability is in no way dependent on the debts of the estate or their payment. (4) In setting forth a *subsequent* parol agreement, modifying a contract under seal, a new consideration must be stated: *Wilgus v. Whitehead*, 8 Nor., 131, 134. In setting forth a *prior* or *contemporaneous* parol agreement, modifying a contract under seal, it must be averred that it was *on the faith* of such parol agreement that the sealed instrument was executed: *Boyd v. Bruce*, 3 Phila., 206; *Callan v. Lukens*, 8 Nor., 134, 136; *Miller v. Henderson*, 10 S. & R., 90, and cases there cited.

Contra, J. S. Cook, Esq.

Opinion by EWING, P. J. Filed

This suit is properly brought in the name of the executor of John Magill as legal plaintiff.

But the executor is *only legal plaintiff*. Should he receive the money it would not be *prima facie* assets of the estate. Under the conditions of the bond the money is payable to certain children and grandchildren of John Magill, named in his will, executed before the date of the bond and referred to therein. A revocation of that will would not have changed the *cestui que trust*.

Under our rule of court (No. 103) the persons for whose use the suit is brought should have been named on the record; and in default thereof, judgment of *non pros.* might have been entered on motion. No such motion has been made and the merits of the case, as disclosed in the affidavits, do not require the court to enter such order without motion. The use parties can at any time be named on the record, as the affidavit sets out some of them by name and others by sufficient designation.

The affidavits of the defendant do not allege payment of any portion of the debt, nor do they disclose any ground of defense.

Rule absolute.

LICENSE AND EASEMENTS.

How Created and How Lost.—II.

To the Editor of the Pittsburgh Legal Journal:

We conclude, therefore, that the instrument under consideration amounts to a sale of all the oil, subject only to the one-tenth as royalty. This is its legal effect, the effect the parties intended it to have, no matter by what name it may be called or known.

Asserting, however, that it should be called an easement, by what means can it be renounced, surrendered, abandoned or extinguished? How may the rights granted be lost? And this is really the question we set out to answer. We answer, a grant by deed cannot be lost unless by a deed existing as a fact or presumed as a conclusion of law. Rights gained by adverse use and enjoyment may be lost by non-user by the owner, and an adverse and inconsistent use by another for a period of twenty-one years. Even a deed may be defeated under statute of limitations, but on this more hereafter.

"Against such a grant there is no statute of limitations without actual hostile and adverse possession, and certainly no prescription or presumption from non-user. Nothing less than an absolute denial of the right, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, could work an extinguishment of it. The law will, in some cases, presume a grant in support of a right

which has been enjoyed by a person without objection or interruption to the exclusion of all others for a period of twenty-one years or more. Yet it does not follow that it ought to make such a presumption in order to defeat a DEED without anything being shown to have taken place in the conduct of the parties interested or concerned in the right that was inconsistent with the right and its enjoyment." *White v. Crawford*, 10 Mass., 183; *St. Mary's Church v. Miles*, 1 Wharton, 82.

Harshuser v. Randall, 109 Mass., 586, involved the right of way over a strip of land on Warren-place, in Boston. The real question was, has the right been lost? The bill was filed April 8, 1870. The defendant proved under objection, "In 1838 or 1839 there was a passage way. I had no use for it and gave it up to Joshua Harlow, who then owned the land now belonging to the defendant, and told him that if he would give me a piece of land on Fremont street I would give up all right and title to the passage way. Since that time I have not claimed or used it." The defendant was also allowed against the plaintiff's objection to give evidence tending to show that this agreement was carried out by delivering possession of the land on Fremont street to Richard Blanchard. There was also evidence tending to show an adverse enjoyment of the whole strip by the defendant and her grantors for more than twenty years. CHAPMAN, C. J., speaking of the competency of this evidence, says: "It was properly admitted. It tended to prove that Blanchard, under whom the plaintiff claims had abandoned the easement, and the defendant's grantors had had adverse possession and *exclusive use of the land covered by the easement for more than twenty years.*"

"It was held that a non-user till 1810, of a right of access to mines reserved in a grant of land, dated 1704, was not by itself sufficient ground for presuming that the right had been released. Adverse possession coupled with such non-user might have raised a presumption of release." *Seaman v. Vawdrey*, 16 Ves., 390.

"I do not think that this court means to lay it down that there *can* be an abandonment of a prescriptive easement like this without a deed, or evidence from which the jury can presume a release of it."

5 L. J. N. S. C., 77;

Lowell v. Hill, 3 C. B. N. S., 127;

2 Blng. N. C., 300;

Jamieson Pond Aqueduct v. Chandler, 121 Mass., 3.

"A mere license is revocable, but that which is called a license is often something more than a license. It often comprises or is connected with a grant, and then the party who has given

it cannot in general revoke it, so as to defeat his grant to which it is an incident:" *Wood v. Leadbitter*, 13 M. & W., 838.

"So a deed which granted license power and liberty to dig for tin and dispose of the tin obtained, on certain terms for a period of twenty-one years, only grants a license to take the ore which should be found and does not confer any estate or interest in the sale, but the license is irrevocable on account of its carrying an interest in the ore:" *Doe v. Wood*, 2 B. & Ald., 738.

"It could not be extinguished or renounced unless by a deed or note in writing, or by act and operation of law. It could not be renounced or extinguished by a parol agreement between the dominant and servient tenement:"

Kidder v. Kidder, 9 Casey, 268.

Erb v. Brown, 19 Smith, 216.

Dyer v. Sandford, 9 Met., 395.

"It is undoubtedly true that a right of way may be lost in the same way it has been acquired, and when acquired by adverse possession for twenty-one years, I should suppose be lost by non-user for the same time. When, however, it has been acquired by grant it will not be lost by non-user in analogy, the statute of limitations, unless where a denial of the title or other acts on the adverse party to quicken the owner in the assertion of his right:" *Butz v. Thre*, 1 Rawle, 218; *Nitzell v. Paschall*, 3 Id., 80.

"If the instrument contain the grant of an easement, or privilege to either party in the land or water; against such grant there is no statute of limitations without actual, hostile and adverse possession; and certainly no prescription or presumption from mere non-user. Nothing less than an absolute denial of the right followed by an enjoyment inconsistent with its existence can amount to an extinguishment of it:" *Lenderman v. Lindsey*, 19 Smith, 98; *St. Mary's Church v. Miles*, 1 Wharton, 229.

"A mere non-user of a way or easement created by deed without proof of adverse enjoyment by the owner of the land is not sufficient proof of an abandonment of the right:" *Bannon v. Augier*, 2 Allen, 129.

"A right of way acquired by prescription may be lost by non-user, but it cannot be lost or extinguished by mere non-user, when it has been acquired by deed. Nothing short of a holding strictly adverse for twenty years could produce the latter result:" *Smyles v. Hastings*, 22 N. Y., 229.

"*Foust v. Ross* does not afford the least shadow of ground for saying that the owner of the land, holding it under a warrant and survey returned, can be said to have abandoned his

rights to it when no sale has been made for taxes or other legitimate purpose for twenty-one years at least, though forty years or more may have passed:" *Bunting v. Young*, 5 W. & S., 197.

"Inchoate rights may be abandoned, but abandonment is scarcely predicable of perfect titles:" *Mayor et al. v. Riddle*, 1 Casey, 263.

"Non-user of an easement for less than twenty years will not create a presumption of its abandonment:" *Wilder v. St. Paul*, 12 Minn., 192.

"The license in question and acts done under it could not operate as a release because not in writing * * * nor could it operate as proof of a release by adverse possession because it had not continued a sufficient length of time:" *Dyer v. Sandford*, *supra*.

"But as by the rules of law an easement is an interest to be acquired and released only by and between the parties respectively. When it has continued and the owner of the dominant tenement has voluntarily abandoned his right, so as, *de facto*, to withdraw the encumbrance from the servient tenement without a release to its owner, the proof must go to this extent. * * * Thirdly. That the acts are of so decisive and conclusive a character as to indicate and prove his intent to abandon:" *Munroe v. Rawson*, 3 Barn. & Cres., 332; 5 Dowl. & Ryl., 234. J. M. T.

THE SUPREME COURT JUDGESHIP.

Major A. M. Brown, the Choice of the Allegheny County Bar for the Vacancy to be Occasioned by the Expiration of the Term of Chief Justice Sharswood.

On Saturday afternoon last a meeting of the Bar of this county was held at the Court-House to indorse Major A. M. BROWN as a candidate for the vacancy to be caused in the Supreme Court by the expiration of the term of Chief Justice SHARSWOOD. For several days previous to the holding of the meeting a call had been in circulation requesting Major BROWN to become a candidate, and had been signed by over two hundred and fifty practicing attorneys at this Bar.

The meeting was called to order at 2 P. M. by W. S. Purviance, Esq., who nominated as Chairman, John H. Hampton, Esq., who was elected by acclamation. F. M. Magee, Esq., nominated the following additional officers who were promptly elected: Vice-Chairmen, George Shiras, Jr., R. B. Carnahan, Thomas M. Marshall, Esq's, and Hon. Thomas Mellon. Secre-

taries, E. Y. Breck, J. E. McKelvy and A. S. Miller, Esq's.

Charles W. Collier, Esq., stated the object of the meeting and read the call. John S. Robb, Esq., District Attorney, offered resolutions indorsing Major BROWN, which, on motion of John Dalzell, Esq., were referred to the following committee appointed by the chair: John S. Robb, John Dalzell, R. E. Stewart, John Barton, Jacob H. Miller and J. F. Slagle, Esq's. The committee after consultation reported the resolutions as follows:

1. Recognizing capability, integrity and industry as the essential qualifications of a good judge, and further recognizing these qualifications as possessed in a very marked and eminent degree by Major A. M. BROWN, of our Bar, this Bar meeting to-day assembled most cordially and heartily commends and urges his election to the vacancy on the Supreme Bench shortly to occur upon the expiration of the judicial term of the present distinguished Chief Justice SHARSWOOD.

2. We most earnestly urge upon our brothers of the profession throughout the State the adoption of this suggestion, assuring them as we do that no better or fitter nomination could possibly be made, nor one which would more entirely commend itself, without distinction of party, to the citizens of this entire Commonwealth.

3. And we do further most respectfully suggest to the various Republican County Conventions of this State, shortly to assemble, the adoption by them of resolutions indorsing the candidacy and fitness of Major BROWN and the selection of delegates to the Republican State Convention favorable to his nomination, urging them to forward and promote his candidacy by all fair and honorable means in their power.

4. That the chairman of this meeting is hereby instructed at his earliest convenience to appoint a committee, consisting of fifteen members of the Bar, who shall take charge of all the details of the candidacy in such manner as shall best commend itself to them, and accomplish, if at all possible, the wishes of this meeting as here and now expressed.

The resolutions were unanimously adopted as read. During the absence of the committee several short speeches eulogistic of Major BROWN were made by ex-Judge MELLON, A. Blakeley, Esq., and others.

A brief sketch of the life of the gentleman thus brought so prominently before the public will not be inappropriate.

Major BROWN was born in Butler county, Pa., where his father still resides. His father, Joseph Brown, born in the year 1800, in Cumberland county, Pa., is a descendant of a family whose individual members participated with honor in the American revolution. His mother, Mary Marshall (a sister of Hon. Thomas M. Marshall), was born in county Derry, Ireland, but came, with her father's family, to Pennsylvania, when she was quite young. She was notable for her intellectual power and womanly graces.

Major BROWN married Lucetta Turney, of

Greensburg, a granddaughter of the distinguished Rev. William John Weber, celebrated as a college professor and pulpit orator, and especially remembered historically as the founder of the oldest church in Pittsburgh, and of other churches in Western Pennsylvania. The Major was primarily destined by his parents to pursue a mercantile life, and when quite young became the recipient of a thorough business training, which has subsequently been of great value to him as a lawyer practicing in a great commercial centre. Later, he abandoned commercial pursuits, and, in accordance with his earliest and ardent desires, entered upon the study of the law. Having diligently and successfully studied the legal science and practice under an able preceptor, Hon. Thos. M. Marshall, he was admitted to the Bar of Allegheny county, in 1853, and immediately entered into partnership with his learned preceptor, and the law firm of Marshall & Brown soon attained high rank in the profession. The members, individually, also became prominent leaders in politics; not, however, as holders and seekers of office and emolument, but as public-spirited citizens, for neither of them has either held or sought public offices. From the date of his admission to the Bar, until the present time, Major BROWN has actively pursued the practice of his profession, until 1865, associated with Mr. Marshall, and since that date alone, and he is now, and has been for years, widely recognized as an eminent, influential and upright lawyer, distinguished for his scholarly attainments, ability and success. The records and reports of the courts well indicate the extent and importance of his professional business, and the energy and ability requisite for its accomplishment. His practice, as a popular lawyer, has been as varied as the innumerable controversies that have arisen from the great manufacturing and business interests of Allegheny county. Although he has never sought or held any political position of profit, the characteristics which have secured him eminence in his profession have conduced to make him very popular with the people; and, although often named for honorable positions, he has hitherto declined to be a candidate. He has not sought a nomination for the Supreme Bench; but, upon the almost unanimous call of the Bar of this county, earnestly seconded by influential men of other portions of the State, he has consented to become a candidate. His age, learning and professional experience, combined with general good qualities and agreeable manners, so well known to all who have enjoyed personal intercourse with him, eminently attest his fitness for a seat in that court.

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PITTSBURGH, PA., FEBRUARY 8, 1882.

Supreme Court, Penn'a.**CRAIGHEAD, Defendant Below, v. McLONEY.**

Any alteration in a writing which imposes on a party a burden or peril which he would not else have incurred, is an injury to him and therefore a material alteration which will avoid the instrument, and it does not matter that the alteration was made honestly and without fraudulent intent.

Per SHARSWOOD, C. J.—It appears to be settled that an alteration entirely immaterial, which places no responsibility on the parties to which they were not subject before the change, does not vitiate the instrument.

In an action against the survivor of two signers of a note, the payee is not a competent witness whether the deceased be either a surety or co-promisor.

Error to the Court of Common Pleas of Washington county.

This was an action of debt brought by McLoney against Craighead, on a note reading as follows:

\$1,080. March 31, 1868.

One day after date we or either of us promise to pay to James McLoney, or order, one thousand and eighty dollars, without defalcation for value received.

Witness our hands and seals at eight per cent. interest.

JOHN HAINES, [SEAL.]

JAMES CRAIGHEAD, [SEAL.]

An offer of the note in evidence was objected to on the ground that it showed upon its face that it had been altered by adding the words "at eight per cent. interest." This alteration the plaintiff below admitted had been made by him after the execution and delivery of the note without the knowledge or consent of Craighead; but he claimed that it was made under an agreement with John Haines, the principal debtor, who died sometime before the bringing of the suit.

For the purpose of showing the circumstances under which the alteration had been made, the plaintiff was offered as a witness in his own behalf to prove an agreement made with John Haines, the deceased principal, by which eight per cent. interest was to be paid. He was objected to as incompetent in an action against Craighead, the surety, to testify to any transaction between himself and the deceased principal. This objection was overruled and the testimony admitted.

He testified: "When the note was first made it did not have the words 'at eight per cent. interest' in it. Afterwards when I told Mr. Haines I must have my money he said if I would wait he would pay me eight per cent. and then I agreed to that. He asked me to make the change in the note. I did it at his request and in his presence, * * * the interlineation or alteration of the note was done by me at the instance of Haines and in his presence and with his consent. * * * I regarded Mr. Haines as good for the payment of the note, at the time I made the alteration. * * * Mr. Craighead was not present, I had no conversation with him at any time in regard to it. * * * So far as I know Mr. Craighead had no knowledge of that alteration to eight per cent."

After this explanation, the note was again offered in evidence, admitted and submitted to the jury with the instruction from the court that the addition of the words "at eight per cent. interest" was "an immaterial alteration, unless the plaintiff had an actual design to defraud Mr. Craighead."

The admission of the note in evidence and admitting the testimony of McLoney to the agreement between himself and Haines were assigned for error.

For plaintiff in error and below, *Messrs. J. W. & A. Donnan.*

Contra, Messrs. Braden & Miller and Brady.

Opinion by SHARSWOOD, C. J. Filed January 2, 1882.

There is a wilderness of cases in the books on the subject of the alteration of notes and other instruments of writing, through which it would require much time and labor and great ingenuity for any one to tread his way. Of course they are not all consistent and easily reconciled. Fortunately it is not required of us to attempt this task in the present case. Perhaps a key to this variety and want of harmony may be found in the remark of Mr. Chief Justice THOMPSON in *Kountz v. Kennedy*, 13 P. F. Smith, 190. "There is no subject in the books which has occupied a much larger share of attention than questions of the alteration of writings, but after all that has been said, each case must stand much more on its own facts than upon the rules announced in any given case." My own opinion is that the courts have gone far enough in permitting writings to be tampered with.

It appears to be settled, however, that an alteration entirely immaterial, which places no responsibility on the parties to which they were not subject before the change does not vitiate the

instrument. Its identity remains. The difficulty has been always in determining what is or what is not material. It is evident that any tampering with the instrument which imposes upon the party a burden or a peril which he would not else have incurred is an injury to him and therefore material. It is a mistake to infer that whether the pecuniary liability is increased, or the time of payment changed is the test. In these respects the party may be no worse, yet his rights and remedies on the instrument may be seriously affected. Wherever this is so it does not matter that the alteration was entirely honest, and with no fraudulent intent. This will be often found to be the case where the note or instrument has been executed by several parties. But it may be in other instances as where attesting witnesses have been added to an instrument after execution: *Marshall v. Gougle*, 10 S. & R., 164. An alteration of the date of a promissory note by the payee, whereby the time of payment is retarded avoids the note: *Stephens v. Graham*, 7 S. & R., 505. We might multiply cases of this type where the amount of the pecuniary responsibility remained unchanged. Wherever, therefore, a note or instrument is executed by two or more parties, any alteration in it without the consent of all renders the recourse of the party who has not assented more difficult and expensive. In the case in hand when Craighead, if compelled to pay the note, comes to pursue his remedy against his co-promissor, either for indemnity or contribution, as the case may warrant, it will not be enough to produce and prove the note. He must account for the alteration apparent on its face. He must show that it was made with Haines' consent. It is clear then that the alteration was material to him. So if Craighead had been sued in some other State, he would have to show that the note was executed in Pennsylvania and that by the law of this State only six per cent. could be recovered upon it. In short, as Mr. Parsons has briefly and well stated it in his treatise on Promissory Notes, p. 582, "Any alteration which changes the evidence or mode of proof is material."

These considerations are sufficient to dispose of this case without adverting to the fact that by the alteration one day's additional interest was actually imposed on the defendant. It is no answer to say that this day's interest was not demanded or received or to plead the maxim *de minimis non curat lex*. In *Stephens v. Graham*, *supra*, and in *Kennedy v. The Lancaster County Bank*, 6 Norris, 347, the payment of the note was retarded by the alteration of the date only a single day.

We think, therefore, the learned court below erred in holding the alteration in this case immaterial and so instructing the jury.

It appears to us clear that McLoney was incompetent as a witness for the purpose for which he was offered. It is true the representatives of Haines were not parties, but still it is clear that his estate would ultimately be answerable, either for the whole amount if Craighead was a surety, or for his contributory share if he was only a co-promissor. McLoney cannot be a witness to fasten this responsibility on the estate of the dead man by his testimony either directly or indirectly. Under the view we have taken of the materiality of the alteration, however, the evidence of this witness as to the assent of Haines and the honesty of the alteration is not important.

Judgment reversed.

KINNEAR, Plaintiff Below, v. GEALY et al.

An agreement to convey, or an actual conveyance of land, bound by the lien of a judgment, with intent to defeat the same on the part of the vendor, the fact being known by the vendee, is not such a fraud under the Statute of 13th Elizabeth, as will render the instrument or conveyance void, since it could not have hindered, defrauded or delayed the judgment creditor. He could have proceeded to sell the land just as well after the agreement or conveyance as before it.

Error to the Court of Common Pleas of Venango county.

Ejectment, August 7, 1877, brought by F. D. Kinnear, an attorney of said county, against A. W. Gealy *et al.*, devisees and lessees of George W. Gealy, who had died, March 31, 1877, for one hundred acres of land, in Clinton (formerly part of Scrubgrass) township, and upon which oil was discovered, August 8, 1876. Both parties, substantially, claimed title derived through one Wm. P. McKee. The plaintiff claiming by virtue of a judgment obtained by Samuel Sloan against McKee & Harris, May 31, 1851. *Fi. fa.* issued thereon, levy, inquisition and condemnation. *A vend. ex.* and sale thereunder, November 21, 1857, and a deed in pursuance thereof made to plaintiff by the sheriff of said county.

The defendants claimed title (1) by virtue of the following indenture:

"Articles of Agreement, made and concluded this 29th of November, in the year of our Lord one thousand eight hundred and fifty-three, between Wm. McKee of the township of Sugarcreek, county of Venango, State of Pennsylvania, of the first part, and George W. Gealy of the township of Scrubgrass, county and State aforesaid of the second part. Witnesseth, that the said first part doth (for and in consideration, hereinafter mentioned), grant, bargain and sell, unto said second part, a certain tract or parcel of land, situated in Scrubgrass township, county and State aforementioned, being part of the Mor-

row tract, bounded," etc., (giving the adjoinders), "containing one hundred acres more or less. And the said second part doth agree on his part to pay therefor (as soon as) a suff treasurer's deed can be obtained, so as to insure the title to the said premises to the said second part, the sum of one hundred (and fifty) dollars, currency of the Commonwealth, on the premises, or his own residence in the aforesaid Scrubgrass township, and the said second party to have full possession of said premises from this date, with all appurtenances belonging thereto. In witness whereof, the said parties have hereunto set their hands and affixed their seals on the day and year above written.

"Attest:—

"The words 'as soon as' and 'fifty' interlined before signing. } "WM. P. MCKEE, [L.S.]
"SAMUEL F. DALE. } "G. W. GEALY, [L.S.]

"Received, November 29, 1853, on the within contract, one dollar. "WM. P. MCKEE."

At the date of this instrument the Sloan judgment was a valid and subsisting lien on the land.

And by adverse possession of the premises in dispute thereunder, from that date to the time of trial, by Gealy and those claiming under him.

2. By a purchase, at the same sheriff's sale as that of plaintiff on the same writ, made by one S. B. Meyers (at that time a student of law in the office of his father, who was the law partner of the plaintiff), a deed by the sheriff to Meyers for two hundred acres, which included within it the one hundred acres claimed by plaintiff, an assignment by Meyers of his interest therein, January 5, 1858, to G. W. Gealy, the ancestor of defendants, and possession thereunder by Gealy and those claiming under him. At the trial McKee testified, *inter alia*: "I was indebted to Sloan; he got a judgment against me; Mr. Gealy knew about this judgment; we talked about it previous to the signing of this article—at the time I talked of selling him the land; Mr. Gealy knew I wanted to get this land out from under the Sloan judgment; I considered it unjust and did not want to pay it. Mr. Gealy knew this before and at the time he signed the agreement marked Exhibit 'A.' There was no agreement that I was to get the land back."

The Court (TAYLOR, P. J.), in its answers to points and charge submitted to the jury to find,

1. Was there a fraud intended, by the agreement of 1853, to be practiced on McKee's creditors by McKee and knowingly participated in by Gealy?

2. If a fraud was intended by the agreement of 1853, has or has not the plaintiff instituted his suit within five years from the time he discovered it or by reasonable diligence might have discovered it?

3. Was there a double levy or not, and did or did not the purchase of Myers include the purchase of plaintiff?

4. Were or were not the acts of plaintiff, at the time of the sheriff's sale in 1857, of such a character as were calculated to mislead the purchaser, Meyers, to his detriment?

Verdict and judgment for the defendants. The plaintiff took his writ of error and filed thirteen assignments.

For plaintiff in error, *Messrs. J. H. Osmer* and C. Heydrick.*

Contended the agreement of McKee and Gealy of 1853, if a conveyance, is fraudulent and void under the Statute of 13th Elizabeth, since it was made for the purpose of defrauding and defeating creditors and especially for the purpose of *wresting the land from the lien of the Sloan judgment* which was a valid and subsisting lien thereon, at the time of said agreement and if not fraudulent, then it is a conveyance of a life-estate simply as the word "heirs" is not contained therein: *Rider v. Maul*, 20 Sm., 15; *Rider v. Maul*, 10 Wr., 379; *Maul v. Rider*, 1 Sm., 377; *Ibid.*, 9 Sm., 167; *Englebert v. Blanjet*, 2 Wh., 240; *McKee v. Gilchrist*, 3 Watts, 230; *Johnson v. Harvey*, 2 P. & W., 82; *Irwin v. Kean*, 3 Wh., 355; *McClurg v. Leckey*, 3 P. & W., 83; *Kain v. Weightley*, 10 H., 182; *Aston v. Aston*, 1 Ves., 368; *The Short Staple*, 1 Gallis, 104; *Gallatin v. Cunningham*, 8 Cowen's Rep., 306; *Kein v. Weightley*, 22 Pa., 182; 1 Phil. on Ev., note 10, p. 608, 4th Amer. Ed.; *Redfield v. Dysart*, 62 Pa., 62; *Abbey v. Dewey*, 25 Pa., 413. Other lands of McKee can be found in the immediate vicinity of the tract claimed by plaintiff to substantially satisfy the requirements of the Meyer's deed (in form like a carpenter's square) and to this land should defendants be turned for the two hundred acres mentioned in said deed.

Contra, *Messrs. Chas. W. Mackey and Winfield S. Wilson.*

The agreement of McKee to sell to Gealy was a *bona fide* contract entered into by Gealy in good faith, for adequate consideration, and contemplating a deed of conveyance in fee simple *in futuro* when title could be perfected by sufficient treasurer's deed: *Dilwyn v. Lewellyn*, 8 Jurist (N. S.), 1068; *Ogden v. Brown*, 33 Pa. St., 247; *Nave v. Jenkins*, 2 Yates, 107; *Sherman v. Dill*, 4 Id., 295; *Kendrick v. Smith*, 7 W. & S., 41; *Stewart's Administrator's v. Lang*, 37 Pa. St., 201.

If the agreement be adjudged to be fraudulent, then Gealy was a trustee *ex malificio*, and plaintiff should have brought his action within five years from the time he first discovered the fraud, or by reasonable diligence could have discovered it: Act of April 22, 1856, *Purd. Dig.*; *Christy v. Sill et al.*, 28 PITTSBURGH LEGAL

JOURNAL, 101; *Fox v. Lyon*, 33 Pa. St., 474; *Brock v. Savage*, 31 *Id.*, 410; *Halsey v. Tate*, 52 *Id.*, 311; *Lingenfelter v. Richey*, 62 *Id.*, 123; *King v. Perdee*, 6 Otto, 90; *Strimpler v. Roberts*, 6 H., 298.

Gealy purchased subject to the Sloan judgment and it was therefore impossible for him to conspire to wrest the land from its lien: *Williams v. Davis*, 69 Pa. St., 21.

PER CURIAM. Filed October 31, 1881.

There was no evidence to submit to the jury of any fraud on Sloan in the sale by McKee to Gealy. Sloan had a judgment against McKee which was, at the time, a lien on the land on which he could proceed and sell it as well after as before the article with Gealy. How then was the contract or conveyance to Gealy a fraud on Sloan?

It could not have hindered, defrauded or delayed him. Sloan allowed the lien of his judgment to expire without reviving it. Gealy bought subject to the lien. We think this disposes of the whole case, and renders an examination of the other questions raised by the several assignments of error unnecessary.

Judgment affirmed.

Circuit Court, United States.

Western District of Pennsylvania.

THE MISSOURI FURNACE COMPANY, a Corporation of the State of Missouri, v. **HANNAH COCHRAN**, Administratrix of **JOHN M. COCHRAN**, Deceased.

The mere purchasing of materials in Pennsylvania, by a foreign corporation, is not doing business within the Act of 22d April, 1874, P. L. 108, which provides, "That from and after the passage of this act no foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein."

Before McKENNAN, Cir. J., and ACHESON, D. J.

This was an action on the case (assumpsit) brought to recover damages for the alleged breach by John M. Cochran in his lifetime, of a contract entered into between him and the Missouri Furnace Company, dated September 20, 1879. The contract was made and executed by both parties in the City of Pittsburgh, Pennsylvania, the agent of the Missouri Furnace Company being there at the time. This contract provided that Cochran agreed to sell to the Missouri Furnace Company 36,621 tons of Standard Connellsville Coke, "to be delivered on cars at the works of said Cochran," which were in Westmoreland county, Pennsylvania,

at the rate of nine cars per day, beginning January 1, A. D. 1880, for which the Missouri Furnace Company agreed to pay him monthly at the rate of \$1.20 per ton of two thousand pounds.

The evidence (*inter alia*) on the trial was that the Missouri Furnace Company was a corporation organized under the laws of the State of Missouri and was engaged in the manufacture of pig iron at its furnaces, near St. Louis, in that State, and that this coke was to be used as fuel for these furnaces. Charles A. McNair, the agent of the Missouri Furnace Company, was examined on the trial of the action and testified that the said company never had established an office or offices or appointed an agent or agents for the transaction of any business in Pennsylvania, nor had it filed in the office of the Secretary of the Commonwealth of Pennsylvania, any statement signed by the president and secretary thereof, showing the title and object of the corporation or the location of its office or the name of its agent, but that the company had for years purchased its supply of coke in Pittsburgh.

Numerous questions, especially with reference to the measure of damages applicable to such action were raised, but were disposed of on the trial, the court refusing but reserving, however, for further consideration the question raised by the first point of the defendant, which point was as follows: "Under the evidence in this case the Missouri Furnace Company was, on September 20, 1879, a corporation of Missouri, and not having complied with the laws of Pennsylvania, without which it could transact no business in Pennsylvania, the contract upon which this suit was brought is illegal and void, and there can be no recovery."

Answer of the court—"This point is refused."

The Act of Assembly, approved April 22, 1874, P. L., 108, provided, "That from and after the passage of this act no foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein." The second section of this act also required the filing by the corporation in the office of the Secretary of the Commonwealth of a written statement, showing the title and object of said corporation, the location of its office and the name of its agent and enacted that until such statement was filed, "it shall not be lawful for any such corporation to do any business in this Commonwealth."

The verdict having been for the plaintiff, counsel for defendant moved for judgment on the reserved point.

For defendant, *Messrs. Charles E. Boyle, J. S. Moorehead and D. T. Watson.*

The plaintiff being a foreign corporation could transact business in Pennsylvania only by permission of the latter State and only on compliance with the laws of said State: *Paul v. Virginia*, 8 Wallace, 181; *Bank of Augusta v. Earl*, 13 Peters, 519; *Thorn et al. v. Traveler's Ins. Co.*, 30 P. F. Smith, 15.

The making of this contract and the purchasing of the coke was the "transaction of its business" in Pennsylvania, but as the company had not complied with the law authorizing it to transact business in Pennsylvania, the contracts made by it were illegal and void.

Contra, Messrs. George Shiras, Jr., and Sol. Schoyer, Jr.

The purchasing by a foreign corporation of its supplies in Pennsylvania, such as coal and coke, is not within the meaning of the statute "transacting business in Pennsylvania." The law evidently refers to some permanent location of the corporation within the State. To hold otherwise would be to exclude from the State of Pennsylvania all the large manufacturing institutions who depend upon us for the supply of coal and coke, and also of her manufactured iron and other products. *C. A. V.*

September 5, 1881, judgment entered in favor of plaintiff on the verdict. By the Court.

Court of Common Pleas, No. 1.

J. H. HAYES' Executors v. BALTIMORE AND OHIO RAILROAD COMPANY.

An award of damages for the taking of land by a railroad company under the Act of 19th February, 1849, Sec. 11, bears interest, not from the time the award is made, but only from the date of filing the report of the viewers in court, notwithstanding the fact that the railroad company is in possession of the land.

Case stated. The facts agreed upon were in substance as follows: The Pittsburgh & Connellsville Railroad Co., of which the defendant, the Baltimore & Ohio Railroad Co., is lessee, previous to and since the 3d May, 1881, was and has been in possession of a certain lot of ground belonging to the estate of J. H. Hayes, deceased. April 2, 1881, the Pittsburgh & Connellsville Railroad Co. applied to the Court of Common Pleas of Allegheny county for the appointment of viewers to assess the damages for the taking of the said land. The viewers met upon the premises, May 3, 1881, and assessed the damages at \$34,575, which included interest on the value of the land, from the time the company took possession to the date of the assessment. The

report of the viewers was made up and delivered by them to the counsel for the railroad company upon the day of its date, May 3, 1881. The counsel for the company failed to file the report in court until June 18, 1881, upon which day it was filed and confirmed *nisi*. No exceptions were made to it, and on the 4th October, 1881, the company paid the amount of the award with interest thereon from June 18, 1881, the date of filing it in court. The present suit was brought by plaintiffs to recover interest on the award from May 3, 1881, to June 18, 1881, and it was agreed that if the court should be of the opinion that defendant was liable, judgment should be entered for the plaintiffs for \$266.80, with interest from 4th October, 1881, and costs, otherwise judgment to be entered for the defendant; the only question being whether the award bore interest before it was filed.

For plaintiffs, *T. C. Lazear, Esq.*

That interest runs on award from time of assessment: *Concord Railroad Co. v. Greeley*, 3 Foster, (N. H.), 237; *P. R. Co. v. Cooper*, 58 Pa. St., 408; *Philadelphia v. Dyer*, 41 Id., 463.

The neglect of the counsel for the company to file the award ought not to deprive plaintiffs of interest for the time it was improperly kept off file.

Contra, Johns McCleave, Esq.

Whether the award bears interest or not depends entirely upon the statute. The Act of 1849 (Purdon, p. 1219), does not make the award payable until thirty days after it is reported to court and judgment entered thereon. Interest cannot be charged until the time required for putting the company in default has elapsed. Interest is the compensation for withholding the principal *when due* and cannot begin to run until after the principal sum is due and payable.

This principal has been applied to assessments like the present: *Norris v. Philadelphia*, 70 Pa. St., 332, qualifying *Philadelphia v. Dyer*, cited by plaintiff's counsel; *Mickey v. Philadelphia*, 68 Pa. St., 48; Second St. Hghgh., 66 Pa. St., 132; *Phillips v. Pease*, 39 Cal., 582; *Buckman v. Davis*, 28 Pa. St., 211. No interest on verdicts except by statute: *Kelley v. Murphy*, 30 Pa. St., 340; *Irvin v. Hazelton*, 37 Pa. St., 466. The report of the viewers is a record of the court and in legal contemplation is at all times in possession of the court, and if the plaintiffs were so anxious for their few days' interest they should have seen the award was filed. They had the right at any day to compel its immediate filing. That it was not filed is as much due to their *laches* as ours.

Opinion by STOWE, P. J. Filed January 25, 1882.

Being of the opinion that the plaintiffs are not entitled to recover, let judgment be entered for the defendant with costs.

Court of Common Pleas, No. 2.

DARRAH, MOORE & CO. v. H. L. BAIRD.

A tenant cannot maintain trover, either during his term or after its expiration, for fixtures which he had a right to remove, but which have not been removed or detached by him.

Trover lies only for personal goods and chattels. Fixtures as such are not personal chattels. The tenant has but a qualified property in fixtures. He has but a right to remove them during the term. The right is personal property, but is not a personal chattel, and does not entitle him to maintain trover therefor.

Quere. Whether or not the disaffirmance of the lease by the assignees in bankruptcy of the tenant does not *ipso facto* end the term, and with it the right to remove fixtures.

Motion to take off compulsory nonsuit.

Opinion by EWING, P. J. Filed January 28, 1882.

This is action of trover and conversion brought 3d September, 1880, to recover damages for the taking and alleged wrongful conversion by defendant of a large amount of machinery, a railroad switch, etc., which the testimony shows to have been fixtures in and about a box and keg factory leased by defendant to plaintiffs. I do not understand that there is any controversy in regard to this branch of the case, to wit: that the machinery, etc., sued for were in fact, as the evidence shows, fixtures—such as would pass to a vendee under a deed of conveyance as a part of the real estate—and that as between landlord and tenant, if the tenant had put in this machinery or owned it, he would be entitled to remove it during the term.

Also, I have no doubt that plaintiffs' evidence was sufficient to go to the jury, and to justify them in finding that the plaintiffs had purchased the machinery, and were, as to the defendant, in the same position as though they had, after entry, put in these fixtures during their term.

We are also of the opinion that the written demand made on defendant, 1st September, 1880, was sufficient demand to enable the plaintiffs to maintain trover on the neglect or refusal of the defendant to deliver possession.

The defendant being the owner in fee of a large lot of ground in Allegheny City, on which was erected a box and keg factory, in August, 1877, leased the same to defendants for a term of three years from 1st September, 1877, at a rent

of \$150 per month, payable quarterly, they to pay the taxes and insurance premiums, etc., with a provision for re-entry and right to avoid the lease on failure to pay rent, taxes or insurance.

The evidence shows that on the 3d day of August, 1878, the plaintiffs on their own petition, or that of one of their own number, were duly adjudged bankrupts by the District Court of the U. S., for the Western District of Penn'a.

On the 6th of September, 1878, assignees of said bankrupts were duly chosen, and they threatening to take away and sell the fixtures, H. L. Baird filed a petition in the court of bankruptcy to prevent them from so doing, to which the assignees replied, on 24th September, 1878, admitting that a quarter's rent was due on 1st September and remained unpaid, distinctly repudiating any obligation or intention on their part to continue the lease beyond the bankruptcy, but claiming the right to remove the machinery as personal property belonging to the bankrupt.

On the 24th of September, 1878, the court, on hearing of "the petition and answer, and by consent of parties," ordered the assignees to deliver to Baird possession of the machinery, etc., upon his giving bond in the sum of \$6,000, conditioned for the forthcoming of the property upon the determination of the proceedings to determine the right of property in said machinery. Bond was so given and Baird took possession of the machinery—the assignees being directed to proceed to remove and sell all personal effects of the bankrupts.

The question was referred to the register in bankruptcy who took testimony and reported the right of property to be in Baird—the District Court decreed accordingly,—but on appeal by the assignees, the Circuit Court dismissed the proceeding, December 18, 1879, *for want of jurisdiction*. All of which appears from the records in evidence. From 24th September, 1878, H. L. Baird continued in possession of the premises.

On 12th December, 1878, the court made a decree confirming a composition with creditors under which the plaintiffs were restored to the rights of property under the assignees.

It does not appear that plaintiffs ever paid or tendered rent in arrear or made any claim to be restored to possession of the leased property. Under this state of facts plaintiffs' counsel contend that the defendant is bound to deliver the fixtures to the plaintiffs as though they had been detached and removed during the term, and on refusal to do so, that he is liable in an action of trover.

Defendant's counsel contend, first, that the bankruptcy and the unequivocal repudiation by the assignees of all liability for continuance of the lease, ended the term and at the same time ended the right of the tenants to remove the fixtures; and, second, that even if plaintiffs continued to have any right of property in the machinery trover will not lie therefor.

It is settled that the assignees in bankruptcy have an option to either affirm and continue or disaffirm and surrender the leasehold of the bankrupt. Having disaffirmed in this case we incline to the opinion that the term was thereby ended, and that the right to remove fixtures ended with their election to disaffirm the lease.

But the authorities seem to be so clear on the other branch of the case that it is unnecessary to decide the first position of defendant's counsel.

Chitty, Vol. I, p. 148, says "this action (trover) is confined to the conversion of goods or *personal chattels*. It does not lie for fixtures *eo nomine*." It is true, that where that which would be a fixture as between landlord and tenant, or that which is an essential part of the freehold, has been wrongfully removed and carried away—trover by the owner of the soil will lie—because he has complete title and right of possession, and the removal and asportation has converted a part of the real estate into a personal chattel. See *Harlan v. Harlan*, 3 Harris, 513, and numerous other similar cases.

The only case we have found (and astute and diligent counsel have aided us), which even appears to sustain the tenant's right to maintain trover for fixtures, is that of *Lemar v. Lemar*, 2 B. & A., 164. The plaintiff (tenant) had surrendered his lease shortly before the end of the term, "without prejudice to his right to remove the jibs and other fixtures from a warehouse." A new lease was thereupon made to the defendant, who refused to permit the plaintiff to remove the jibs. The plaintiff brought an action of trover to recover the value of the jibs. The Court, ABBOTT, C. J., held that under the evidence the plaintiff was entitled to recover in trover, but that it depended upon a question of fact to be drawn from the matters stated in the case, and not upon a point of law, holding that the jibs were *personal chattels* and that plaintiff did not lose his right of property by leaving them on the premises. At first glance this would seem to be very similar to our case, but a careful examination shows that the jibs were not treated as fixtures at all, and the court goes on to say, "On the other hand, if the jibs are to be considered as annexed to and parcel of the freehold, then admitting that the plaintiff might have removed them during the term, as

being erections for the benefit of trade, yet they could not after the term—notwithstanding the agreement—maintain trover for them because the action of trover is maintainable for *personal chattels only*."

In *Minshall v. Lloyd*, 2 M. & W., 450, the case of *Lemar v. Lemar* is referred to as being based on the fact that the jibs were not fixtures but personal chattels, and likewise in the case of *Mackintosh v. Trotter*, 3 M. & W., 184, the same point is made by the court.

In *Minshall v. Lloyd*, as also in *Mackintosh v. Trotter*, the question is squarely raised and it is decided that a tenant cannot maintain trover for fixtures even during the term.

In the first case, PARKE, B., says: "The right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be fixtures any longer. That right of the tenant enables the sheriff to take them under a writ for the benefit of the tenant's creditors, but such fixtures are not goods and chattels * * * but they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors." And holds that the right of removal will not enable the tenant to maintain trover for fixtures. All the judges concur.

In *Mackintosh v. Trotter*, *supra*, the Court, PARKE, B., delivering the opinion, says *Minshall v. Lloyd* is direct authority on the point, and that it was decided after careful consideration, "that the principle of law is that whatsoever is planted in the soil belongs to the soil, that the tenant has the right to remove fixtures during the term or during what may for this purpose be considered an excrescence on the term. But they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover." All the judges concur.

In *Overton v. Williston*, 7 Casey, 160, Justice STRONG, discussing the same question, says: "The plaintiff below, however, meets other obstacles in the way of his recovery. Trover cannot be maintained against the owner of lands in possession for property not detached from the freehold which was not annexed by the owner. A tenant may remove it as already seen. His right to remove may be sold under an execution against him, but while the fixture remains attached it is part of the freehold. This is settled by abundant authority." And he cites the above cited cases of *Mackintosh v. Trotter* and *Minshall v. Lloyd*. The reason is given in reference to a removal during the term. Other authorities are to the same effect. Trover is an action to recover damages for the conversion of goods or personal chattels. Fixtures put in by

a tenant are, while attached, a part of the freehold for which trover will not lie. The right to remove them during the term does not entitle the tenant to maintain trover against any one, landlord or trespasser, in possession, either after or before the expiration of the term. It is only when the tenant has removed them before the expiration of the term, that as to him they become personal chattels.

In this case the property sued for was fixtures, never removed by the tenants (plaintiffs). The landlord was in possession at time of demand and suit brought, and whether or not the term had ended with the refusal of plaintiffs' assignees to continue the lease, the action of trover will not lie.

For plaintiffs, *J. S. Ferguson, Esq.*
Contra, *John Dalzell, Esq.*

LICENSE AND EASEMENTS.

How Created and How Lost.—III.

To the Editor of the *Pittsburgh Legal Journal*:

"A right of way established by grant is not lost by mere non-user, unless the non-user is a consequence of something which prevents the user, and is utterly inconsistent with its enjoyment, it continues to exist, although more than twenty years have elapsed:" *Barnes v. Lloyd*, 112 Mass., 231.

"If the lessors of defendants have lost their right it is merely on the ground of non-user. They have produced good documentary evidence of ownership. No one else has shown any title, and there is no adverse possession. Will a mere omission to work the mine extinguish or transfer the right?" *Arnold v. Stevens*, 24 Pick., 112.

"The presumption of a grant against written evidence of title can never arise from mere neglect of the owner to assert his title:" *Jackson v. Andrews*, 3 Wend., 154.

"Nothing short of adverse use on the part of the servient estate, inconsistent with and preventing the use of the easement can destroy the easement. According to authorities the interruption of the easement by adverse use on the part of some person adversely interested must be continued for at least twenty years to destroy the easement:" *Owen v. Field*, 102 Mass., 113.

"Presumptions against written evidence of title can never arise from mere neglect of the owner to assert his rights where there has been no adverse title or enjoyment by those in whose favor the grant or conveyance is to be presumed, and for the obvious reason that the presumption

against the person showing title which arises from the delay in asserting his title is equally balanced by the like presumption arising from the same delay on part of the supposed grantee:" *Schauber v. Jackson*, 2 Wend., 39.

"A reserve of minerals and mining rights is construed as an actual grant thereof. It differs not whether the right to mine is by an exception from a deed of the surface or by a grant of the mine by the owner thereof of the whole estate, therein reserving to himself the surface:" *Marvin v. Brewster*, 55 N. Y., 548.

"The claim of an adverse possession cannot rest merely upon a non-user by the grantors of the defendant. The rights now claimed by them were the subject of an express grant. In such a case, though there be a non-user, if there has been no act of the owner of the surface land which prevented the exercise of the rights of mining, they still exist:" 55 N. Y., 55.

"Abandonment is a simple non-user of an easement, and in order to make out an effectual answer to the claim upon that ground it is perfectly well settled that the enjoyment, nay all acts of enjoyment, must have totally ceased for the same length of time, that was necessary to create the original presumption. We are to inquire, first, was the way used continuously and adversely for twenty years? If so, the title becomes vested. Secondly, has the use been altogether discontinued for twenty years. If not, there is no abandonment:" *Corning v. Gould*, 16 Wend., 535.

"The case finds that the way has been used within twenty years, and it is very clear that the right of way could not be lost by mere non-user for any period short of that time:" *Emerson v. Wiley*, 10 Pick., 316.

In *Dark v. Johnston* the court held the writing was a license. This cannot be strictly correct, but while thus naming it they gave it the effect of a grant in the following language: "Call this what we may, an easement, which is an incorporeal hereditament, or a temporary right to possession, defeasible and ended when it shall be ascertained that the land does not contain oil, it was not for Mr. McGuire to take it away. Neither his conveyance of the land nor re-entry by himself could deprive Baird of the rights obtained by him by virtue of the license."

The phraseology of this grant, or of similar ones, has been construed by our Supreme Court, and the nature of the rights granted are well understood.

Harlan v. The Lehigh Coal Co., 11 Casey, 292, arose on the grant, which is in the following words: "Have let and devised unto the party

of the second part the right and privilege to mine stone coal from veins known as R. and S. veins * * * for three years from date." And the court held that "this conveys an interest in land and is not a mere license to take coal." Such is the ruling in *Funk v. Halde- man*, *Caldwell v. Fulton*, *Caldwell v. Copeland*, *Dark v. Johnston*, *Brown v. Lambing*, *Stoughton's Appeal* and others—the same veins are found.

Thus it seems settled that a license, the lowest sort of interest recognized by law, may, notwithstanding, be as subsisting and irrevocable as any grant which can be made. It may not be such an estate for the recovery of which ejectment will lie, as was held in *Dark v. Johnston*. If, however, even a license is coupled with an interest, it is more than a mere license and is therefore irrevocable. The rights conferred by such a license do not differ in the extent, value or enjoyment of the thing granted from grants known by other names. They may differ, do differ in the remedies to which they are severally entitled in case of an interruption of their enjoyment. They all give or may give interest in and title to the thing granted, and these are neither greater nor less, because we call one a license, the other an easement.

Hence it is not, as stated by Judge GRADON, important to name these various grants with technical accuracy. Indeed the decisions and dicta of courts on this point are far from uniform. They are spoken of as easements, licenses, grants, leases *profits*, *a prendre*, etc., with the most bewildering confusing, but this does no harm, as their mere accurate nomenclature could do no good. In some respects they are similar and in no way is the dissimilarity so great as to hurt.

An easement is never an interest in land, neither is a license. They are not and cannot be corporeal. The rights or privileges are intangible, and exist only as representing something. If the grant in either case is merely a right it is of necessity incorporeal, but when the right to use is unlimited in quantity, time, manner and person, it is in effect a grant of the *corpus*, and therefore corporeal. Hence a right to take all the coal or oil under a certain close is a conveyance of the mineral *in situ*, a part of the realty, and therefore a corporeal hereditament. Such a grant vests in the grantee the exclusive title to and use and enjoyment of the thing granted, and excludes the owner of the soil from all benefit in and right of possession to the coal or oil thus granted:

Goddard's Easement, page 5;

Caldwell v. Fulton, *supra*;
Wilkinson v. Proud, 11 M. & W., 33;
Doe v. Huling & Wood, 23 B. & Ald., 72;
Stoughton's Appeal, *supra*.

To every intent and in effect, therefore, the words we are considering create an interest and title to something real and tangible. The interest is vested and absolute, and the deed is on part of grantor executed and not executory: *Kemble v. Iron Co.*, 9 Norris, 340.

We have seen that the overthrow of an estate or other rights resent in presumption, demands the same character and amount of evidence as is required to create it.

The law recognizes the acquisition of title through lapse of time and by a fiction supplies a deed which never existed, but which it presumes was made; it must protect such title by requiring at least as much proof to destroy as it did, in order to presume the existence of deed. The interest is as legal in one case as the other; why should one be lost by less neglect or lapse of time than the other?

An adverse and hostile user may, if continued long enough, supplant a title no matter how acquired. Such user must in all cases be not only adverse and hostile but it must also be kept up for a period of not less than twenty-one years. Exclusively, notoriously and peaceably. Lacking any of these it lacks what is necessary to overthrow an admitted title.

It must be inconsistent with the rights of the other party. Possession of the surface by its owner for a hundred years could not prejudice the title of an owner of the mineral below, although he did not use nor seek to use his property during all that time. The possession of the former in no manner infringes on the rights of the latter. It is perfectly consistent with his own title and none the less so with that of him whose estate may be a thousand feet below.

No presumption can, therefore, arise against the owner whose use was not interrupted and whose possession was not challenged. A man is not required to keep constant and actual possession of his property or incur the risk of losing it by abandonment or non-user. This title being absolute, he is neither required to use it for the purpose of saving it on the one side, or to prevent some one else from taking it away. He can safely rest on his deed alone for twenty-one years, and an abandonment of it by non-user cannot be sustained. Strictly speaking, an abandonment of a perfect-written title is impossible, as said before, it is not "predicable of a perfect title." Time sufficient to raise the presumption of a grant must elapse, it is therefore not abandonment, but a title wrested by an adverse and hostile use, and this is not more a

destruction of the old estate than the creation and acquisition of a new one. In short, an interest such as we are discussing, cannot be lost until a new one has been created in some way and is ready to take its place. So that the death of the old deed the birth of the new title are concurrent events. It cannot be lost. It exists always, but the question may be, who owns it?

The title of thousands of valuable acres depend upon the principles we have discussed, particularly in the oil regions. These are generally grants of the oil right, the owner of the land reserving the use and occupancy of the surface. In such cases two distinct titles in fee are in existence at the same time for the same land or rather parts of the same land. Farms are usually divided by vertical lines, at right angles to the surface, but in many cases they are divided by horizontal lines. One man may own the timber, another the surface, another the coal, another the limestone, and still another the oil, and all are in fee. The titles are equally formal and solemn, and no man's title is to be taken away merely because it is far below the surface and never feels the sunshine.

A lease for or sale of oil in the ground creates an estate in land, and to defeat or destroy it requires the same amount of proof as would be required by the same way to defeat the title to the surface, and all below each subdivision becomes an independent and perfect estate, which may be held by a perfect title. When that title is evidenced by a writing every presumption arises in its favor and it cannot be overthrown until facts have been shown which are utterly inconsistent with its existence, and in the absence of any other writing this presumption never arises, never can and never should, short of twenty-one years of adverse, hostile, visible, notorious, peaceable and exclusive possession.

J. M. T.

NEW BOOKS.

A MANUAL OF THE LAW applicable to Corporations generally, including also general rules of Law peculiar to Banks, Railroads, Religious Societies, Municipal Bodies and Voluntary Associations, as determined by the leading Court of England and the United States. By CHARLES T. BOONE, LL. B. San Francisco: SUMNER, WHITNEY & Co. 1882. Pages 552. Price, \$3.00.

This little volume contains twenty-two chapters, containing from twelve to thirty sections each. The chapters are entitled: Nature of Corporations, Creation of Corporations, Constitution and organization of Body corporate, Corporate Powers, By-Laws, Meetings and Elections, Corporate Liabilities, Eminent Domain,

Ultra Vires, Stock and Stockholders, Officers and Agents, Remedies by and against, Executions, Mortgage of Corporate Property, Consolidation, Visitation, Dissolution, Banks, Railroads, Religious Societies, Municipal Corporations and Associations.

We think we are justified in saying that every question one could desire to refer to on the law of corporations can be found within the pages of this book. The author states that he has made an effort to "discard all obsolete law" and to "avoid all disquisitions as to what the law ought to be." He has merely given the gist of each decision with a reference to all the cases bearing on it. The book is worthy of a better binding than the publishers have seen fit to give it. It is for sale by Mr. F. G. Kay, of this city, who informs us that he has already sold over thirty copies, which fact, perhaps, is some evidence of its merit.

THE STUDENT'S GUIDE to Williams on the Law of Real Property, Williams on the Law of Personal Property, and Smith on the Law of Contracts. By H. W. PURKES, Esq. Flexible leather, 12 mo. Price, \$1.00 each. Philadelphia: T. & J. W. JOHNSON & Co. 1882.

These volumes are intended as an aid to students in studying the above mentioned text books. The author first puts a question and formulates the answer from the original text. In using them it is recommended that the student first read a section or chapter of text, then commit to memory the questions and answers relating to it, and afterwards re-peruse the text. There could probably be no better way devised for the fixing in the student's memory what he has read. It is certainly more satisfactory than the desultory questioning which most students get from attorneys in active practice. The books are for sale by Mr. F. G. Kay.

A TREATISE ON THE LAW OF STOCK BROKERS, by ARTHUR BIDDLE and GEORGE BIDDLE, of the Philadelphia Bar. Four hundred and fifty pages. Philadelphia: J. B. LIPPINCOTT & Co. 1880.

The Messrs Biddle state in the preface to their treatise that their object in preparing it has been to discuss the law relating to the agents in stock transactions—brokers and customers—and the character of the thing sold so far as it relates to questions arising out of sales of it. The book is divided into four parts, viz: The Stock Brokers (four chapters); The Sale (nine chapters); The Pledge (three chapters); Remedies of the Parties for a Breach of the Contract of sale (two chapters).

This is a well written and most excellent treatise. The text apparently contains everything worth saying on the subject, and the citation of authorities is very complete.

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Supreme Court, Penn'a.

MONTAGUE, Plaintiff Below, v. McDOWELL.

A judgment confessed by warrant of attorney is as perfect a judgment as if entered upon the verdict of a jury after a trial.

The defense of excessive interest cannot be set up collaterally to such a judgment.

Error to the Court of Common Pleas of Crawford county.

The plaintiff in error and below entered to No. 800 of August Term, 1877, a judgment against the defendant of \$631.30, with interest and costs. He also held two notes against the defendant, one of \$24 and the other of \$58. On the 28th day of June, 1878, he settled with the defendant and surrendered the two notes, and also loaned the defendant an additional \$100, and agreed to satisfy the judgment of \$631.30, in consideration of which the defendant gave the plaintiff his judgment note of \$43.80, on which note judgment was entered to No. 706 April Term, 1878, for \$886, which included five per cent. to attorney for collection, and at the same time satisfied the first judgment.

On the 10th day of October, 1880, the second judgment was opened to allow the defendant to show the payment of usurious interest thereon. In the trial of the issue thus formed the court allowed the defendant to attack collaterally the first judgment and to go back of its entry to show that usurious interest was included therein. This was assigned for error.

For plaintiff in error and below, *Messrs. A. J. Harper and W. R. Bole.*

Contra, Thomas Roddy, Esq.

Opinion by SHARSWOOD, C. J. Filed January 2, 1882.

A judgment confessed by warrant of attorney is as perfect a judgment as if rendered upon the verdict of a jury after a trial. The court will, however, in such a case, upon the defendant showing a good defense in law or equity, open it, and allow him an opportunity to controvert the cause for which it was entered before a jury. In no other respect is there any difference, and a judgment confessed is conclusive and cannot be

attacked collaterally by the defendant: *Brad-den v. Brounfield*, 4 Watts, 474; *Haguean v. Salisbury*, 24 P. F. Smith, 280. This rule has been expressly held to be applicable to a case where excessive interest was set up as an answer to the judgment collaterally: *Rutherford v. Boyer*, 3 Norris, 347. In *Hopkins v. West*, 2 *Id.*, 109, a judgment was confessed which included a greater rate of interest than six per cent., and on it the same rate continued to be paid. Afterwards the defendant paid the amount of the judgment and it was satisfied of record. He then brought an action to recover back the excess, and it was held by this court that while he could recover the money paid beyond six per cent., subsequent to the judgment, he was precluded from going behind it and recovering that which was included in it.

That case we think cannot be distinguished from the one presented on this record. Here the judgment confessed, November 2, 1877, was paid and satisfaction entered June 28, 1878. It was not indeed paid in money, but it was paid in law. The notes upon which it was entered were surrendered—additional notes for new debts taken—and a new judgment—the one in question—was entered for the whole amount. Satisfaction was entered on the old judgment which no doubt was part of the arrangement. It cannot be doubted that in law the old judgment was paid. If there had been any fraud or mistake in the transaction, the defendant might have taken a rule to strike off the satisfaction, open the judgment and let him into a defense. The new excess of interest entering into the new judgment was no doubt a defense after it had been opened, but as to the old judgment the defendant was precluded. He had full opportunity from November 1, 1877, to June 28, 1878, to have applied and had the old judgment opened. He did not avail himself of it. If the satisfying of the old and the giving of the new judgment had been simultaneous or nearly so, the court might have considered it a mere device, fraudulently to conclude the debtor, and on that ground have struck off the satisfaction and opened both judgments, but as long as the old judgment stood unopened and unreversed it was conclusive upon the defendant that he owed the debt and it would be a dangerous precedent which would shake this rule on account of the hardness of a particular case.

It is to be remembered in all discussions upon the subject of interest, that what used to be and still is called usury is not now unlawful in this State, as it was prior to 1858. By the Act of 28th May of that year (P. L., 622), the penalty previously imposed for taking more than the

prescribed rate was repealed. The creditor may lawfully charge and receive the excess, though he cannot coerce its payment by suit or process and may recover it back if the action is brought within six months after payment.

Judgment reversed and venire facias de novo awarded.

R. P. BURGAN, Defendant Below, v. THOMAS H. CAHOON et al.

Where a writ of error is to a judgment on a verdict, the rule requires that all the testimony be printed, and the disregard of this rule is a practice which should be abandoned.

The evidence from which a jury may find that one has held himself out and acted as a partner, must be his acts in connection with the circumstances that were known to the plaintiff when he gave the credit, and not only must his acts have been such as to justify a reasonable belief that he was a partner, but to hold him on that account the jury must further find as a matter of fact that credit was given him as such.

The mere fact that a married woman with the knowledge and consent of her husband enters into a co-partnership, does not make the husband liable for debts of the firm contracted during her membership. It is not error to allow an amendment striking out the name of the wife who has been originally sued as a co-partner with her husband and others.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This action was brought by Cahoon & Co. to recover \$634 for lumber sold by said firm to Burgan Bro's, the suit being against John H. Burgan, Elizabeth Burgan and R. P. Burgan, partners, etc.

It was alleged on the part of R. P. Burgan that he was not a partner in the firm known as Burgan Bro's. It would seem that R. P. Burgan, D. B. Burgan and John H. Burgan formed a partnership to carry on the lumber business in March, 1875. In 1876 R. P. retired from the firm, assigning his interest therein to D. B. and John H. Burgan and receiving in payment therefor \$100 cash, and to repay him for money said to have been loaned by him to the firm they gave him a judgment note for \$6,000.

D. B. Burgan subsequently became ill and died. Shortly before his death he assigned his interest in the firm to Elizabeth, wife of R. P. Burgan.

R. P. Burgan took an active interest in the business of Burgan Bro's but claimed that it was part of his contract so to do when he withdrew from the firm. At the trial plaintiffs asked leave to amend by discontinuing as to Elizabeth Burgan and to amend all the records, so that the action should be against R. P. and J. H. Burgan, etc. This amendment was allowed. There were two principal questions to be deter-

mined: First. Did R. P. Burgan by his acts and declarations hold himself out as a partner in the firm of Burgan Bro's and were the plaintiffs, Cahoon & Co., thereby induced to sell the lumber to the firm? Second. Assuming that Mrs. Elizabeth Burgan, wife of R. P. Burgan, was a member of the firm and R. P. Burgan was not a member, to what extent would the latter be liable for the firm debts?

On the first question the instructions of the court below (EWING, P. J.), are quoted fully by the Supreme Court and affirmed. On the second question the court charged the jury as follows: If the jury find that the previous firm of Burgan Bro's had been dissolved in the latter part of 1877 by the death of Daniel Burgan, or by his assignment of his interest in the firm to Elizabeth Burgan, wife of R. P. Burgan, and that thereafter the business was carried on in the name of Burgan Bro's, John Burgan and Elizabeth Burgan being the nominal and intended partners, and this with the knowledge and consent of R. P. Burgan; and further, that the entire capital, or the principal part of the capital of said new firm, consisted of six thousand dollars loaned by said R. P. Burgan to John Burgan and Elizabeth Burgan as partners under the firm name of Burgan Bro's, for which he took their judgment note, dated September 17, 1877, at six months; and that Elizabeth Burgan took no other part in said business except to sign said note to her husband; or took no active part in the business, and that Elizabeth Burgan was without means except her interest in the firm; and that R. P. Burgan, with the knowledge and consent of the other partner, John Burgan, took an active part in the management of the firm business, and did take an active part in the purchase from the plaintiffs of the lumber for the price of which the present suit is brought, and that at the time, the firm was in fact insolvent, and that, having entered his judgment note, R. P. Burgan soon thereafter, by virtue of executions thereon, took and appropriated to his judgment the entire assets of the firm, these facts in law made R. P. Burgan liable as a partner to such third parties, so dealing with him and with the firm, without knowledge or express notice that he was not a partner, and would not be liable for the indebtedness. If the jury find the facts to be as stated in this answer, the verdict should be for the plaintiffs as against R. P. Burgan and John Burgan. Which ruling is also affirmed by the Supreme Court.

For plaintiffs in error, *Messrs. Jacob H. Miller and Robb & Fitzsimmons.*

Contra, E. Edgar Galbraith, Esq.

Opinion by GREEN, J. Filed November 7, 1881.

In this case the plaintiffs claimed that the defendant, R. P. Burgan, by his acts and declarations, held himself out to them as a member of the firm of Burgan Bro's, and that they were thereby induced to sell the bill of lumber in controversy to that firm, upon the reasonable belief on their part that he was a member. In support of this allegation testimony was given. What it was in all its details we do not know. The counsel for the plaintiff in error has printed the testimony of his own client in the appendix, but he has printed none of the testimony of the defendants in error, who were the plaintiffs in the action. This is in entire disregard of the rule which requires all the testimony to be printed, where the writ of error is to a judgment on a verdict and is a practice which ought to be abandoned. In a case like the present, where the questions raised by the assignments of error depend upon the testimony delivered on the trial, it is absolutely essential that all the testimony affecting those questions should appear in the paper-book. We shall and do assume that all the evidence to which the judge who tried the cause refers in his charge when speaking of the acts and declarations of the defendant, was actually introduced before the jury. The charge, upon this branch of the case, was a most careful and correct statement of the law applicable to the subject accompanied with cautious restrictions as to the kind of facts which must be found in order to justify a verdict for the plaintiff. Thus the learned judge said to the jury: "The evidence from which you would have to find that he had so held himself out and acted as a partner, must be his acts in connection with the circumstances that were known to the plaintiffs when they gave him credit, and not only must his acts have been such as to justify a reasonable belief that he was a partner, but, to hold him on that account you must further find as a matter of fact that they gave him credit as such, because if they did not, his holding himself out as a partner would do them no harm. I call your attention to this because we admitted some evidence on that view of the case."

The learned judge then recounts a number of facts as having been given in evidence on this part of the case by the plaintiffs. He says: "The principal facts that the plaintiffs rely on in this branch of the case—namely, that while they insist that he was in fact and intention a partner, that even though he were not, he held himself out to them as such—are, that one of the firm of the plaintiffs went to Mansfield, where Burgan Bro's. did business, and called on R. P. Burgan; that he talked to him (R. P. Burgan)

about selling lumber, and he talked to him as they claim, in such a way that he should have seen that they supposed him to be a member of the firm; that he (Burgan) discussed the lumber question, prices and so on, and sent him around to see his brother at the place of business, where the firm name was Burgan Bro's; that finally a bargain was made, and R. P. Burgan asked afterwards about it, and approved it, and afterwards at Mansfield, in negotiations for purchase of lumber, R. P. Burgan was the party that they (plaintiffs) went to; that he talked about what 'we would do;' that he in conjunction with John made the settlements; that he acted as principal man, giving the directions, doing the figuring and the like; that he wrote letters in the firm name of Burgan Bro's, ordering lumber—these and various other circumstances that have been given as to the manner of doing business. Plaintiffs claim that those acts under the circumstances were such as not only to lead them to reasonably believe that Robert Burgan was a member of the firm, but that he must have known that they were so treating him."

There is no assignment of error to this portion of the charge, nor any allegation that these facts were not given in evidence. We are, therefore, in the absence of the actual testimony, bound to presume that all the facts stated by the court in the charge, as above quoted, was proved on the trial, and if so, they were sufficient to justify the jury in finding that the defendant, R. P. Burgan, held himself out to the plaintiffs as a member of the firm, and in rendering a verdict against him.

There was another aspect of the case. The plaintiffs claimed that R. P. Burgan was liable because his wife was a member of the firm from October 11, 1877, and during the time when the debt in suit was contracted. On that date D. B. Burgan, who was a member of the firm, but was sick and shortly after died, assigned his interest to the wife of R. P. Burgan, and from that time it appears that she and John H. Burgan were actual members of the firm. The court was asked by the plaintiffs to charge that the mere fact of her membership with her husband's knowledge and consent, would make him liable for debts contracted during her membership. This request was refused, but the court proceeded to state that he would be liable if the jury found certain other facts enumerated in the answer, as to which considerable testimony was given. This answer is assigned for error, but it is very clear there was no error in it, if the facts referred to were proved, and of that the jury were to judge. Most of the testimony as to these facts came from the defendant himself.

The second assignment of error calls in question the answer of the court to the defendant's third point. The point was refused in terms, but was affirmed if the jury found the facts as stated in the point without other controlling circumstances in regard to the relations of R. P. Burgan to the business in connection with his wife being the nominal partner. The point might have been affirmed absolutely, if it had not required a direction to find for the defendant upon the hypothesis of the facts stated in the point, subject only to the qualification of a finding that the defendant had held himself out as a partner. This branch of the point ignored the effect of all of the other class of facts growing out of the relations of the defendant with his wife as a member of the firm. It was therefore necessary for the court to add that qualification, and in doing so there was no error.

There was clearly no error in the matter complained in the third assignment because it was based upon a finding of all the other facts in the case in addition to those testified to by the defendant. In that contingency of course the verdict should be for the plaintiffs and this was all the court said.

There was no error in amending the record by striking out the name of the wife. She had been joined originally in the suit and therefore could be stricken out on motion of the plaintiffs, whether her husband was liable as a member of the firm by reason of holding himself out as such to the plaintiffs, or by reason of acts done by him as her husband in connection with her membership, the amendment was equally proper.

Judgment affirmed.

District Court, United States.

Western District of Pennsylvania.

IN BANKRUPTCY.

In Re JOHN T. SHIRLEY, Bankrupt.

Where a judgment creditor issued an execution and by virtue thereof the sheriff made a seizure of goods before the defendant's petition in bankruptcy was filed and sold them after his adjudication: *Held*, that such creditor, after applying the proceeds to his judgment, might prove any unpaid balance thereof, the case not falling within the purview of the prohibitory clause of Section 5075, Revised Statutes.

Sur register's report disallowing proof of the claim of the Eaton, Cole & Burnham Company.

Opinion by ACHESON, D. J. Filed January 31, 1882.

On February 4, 1878, the Eaton, Cole & Burnham Company, the plaintiff, in a judgment against John T. Shirley (the bankrupt) in the

Court of Common Pleas of Armstrong county, issued thereon a *fi. fa.*, No. 214 March Term, 1878, and placed the same in the hands of the sheriff. There was already in his hands a *fi. fa.*, No. 213 March Term, 1878, against the same defendant, issued upon the judgment of the Kittinging Insurance Company. The next day—February 5th—the sheriff by virtue of both these writs of *fi. fa.*, seized in execution personal property of the defendant and advertised it for sale on the 14th of the same month. Robert Galley, Sr., another judgment creditor of Shirley, on February 5th issued a *fi. fa.*, No. 218 March Term, 1878, which came into the sheriff's hands the succeeding day. These facts appear from the exemplification of the Common Pleas record attached to the register's report and an exemplification in Galley's case on file in this bankruptcy number.

It is alleged there were still other executions in the sheriff's hands, but of this we have not the proper evidence; at least, we are without particulars, except that the sheriff's return shows he sold as well on *fi. fa.*, No. 31 June Term, 1878, as on *fi. fas.*, No. 213 and No. 214 March Term.

On February 11, 1878, John T. Shirley filed his petition in bankruptcy, and on the same day this court issued restraining orders against the Eaton, Cole & Burnham Company and certain other execution creditors enjoining sales by the sheriff until a motion for an injunction could be heard. Upon such hearing the court refused the injunction and dissolved the restraining orders; whereupon the sheriff proceeded to sell the property so levied on and sold the same between the 9th and 30th days of March, 1878, inclusive. J. T. Chalfant was chosen assignee of the bankrupt, March 28, 1878, and the assignment to him seems to have been made on the 30th.

A portion of the proceeds of the sheriff's sale reached the Eaton, Cole & Burnham Company's judgment, but a large part thereof remained unsatisfied. For this unpaid balance the company sought to make proof in bankruptcy, but the register would not allow the proof. The case is now before the court to review this action of the register, whose refusal to admit the proof rests upon the assumption that Section 5075 of the Revised Statutes is conclusive against the company's right to prove. That section is as follows:

SEC. 5075. "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement

between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

Is the case of the Eaton, Cole & Burnham Company within this prohibition? It is certain the company had neither a mortgage nor a pledge. Was then its levy, which anticipated the bankruptcy, a *lien* within the meaning of this section and the goods in the hands of the sheriff property which the execution creditor was bound either to release and deliver up or have sold in the manner here contemplated, in order to prove any part of its debt? The question seems to be new; at least, counsel have referred me to no decision upon it. It is not met by any of the cases cited by the register. I have nowhere found the precise point discussed except in the treatise of Avery & Hobbs on the Bankrupt Law of the U. S., at page 160, where it is said: "If he" (the creditor) "has a judgment and execution he may finish his levy if his lien attached absolutely before bankruptcy, and, after applying the proceeds, he may be permitted to prove any unpaid balance."

The present is not a case of judicial proceedings commenced, or an execution sued out, after bankruptcy. When the jurisdiction of the bankrupt court attached, the goods were already rightfully in the custody of the law; a circumstance, I think, of controlling weight. To prevent a sale by the sheriff the interposition of this court was invoked, but the injunction sought was refused and the temporary restraining orders which had been granted were dissolved. It is, therefore, quite inaccurate for the creditors opposing the proof to assert that the Eaton, Cole & Burnham Company sold the goods at sheriff's sale "in open disregard of the bankruptcy proceedings." It may be that the refusal to enjoin and the dissolution of the restraining orders cannot be interpreted as equivalent to a direct permission by this court to the company to sell upon its *fi. fa.*; but we may assume the court was satisfied that the execution was not impeachable as an unlawful preference and that no good reason existed for its interference. The goods then being lawfully held by the sheriff by virtue of execution process from another tribunal, how could the bankrupt court undertake to direct the manner

of sale? The law regulated that. The case, therefore, as it seems to me, is not within the purview of the prohibitory clause of the bankrupt act relied on for excluding proof of this claim.

Moreover, the difficulties in the way of the Eaton, Cole & Burnham Company complying with the requirements of Section 5075 would seem to have been insurmountable. The company was not the sole execution creditor, and, hence, could not control the proceedings. There were in the sheriff's hands at least two other executions—one prior and one junior—in respect to which this creditor was powerless.

Again; the sheriff having actually levied upon the goods before bankruptcy, the case did not stand on the footing of a mere *lien*. By virtue of the seizure, the legal title to the property vested in the sheriff who became answerable for its value to the execution creditors: *Hunt v. Breading*, 12 Ser. & Raw., 41; *Hartlieb v. McLane*, 44 Pa. St., 510. Indeed, as respects other creditors, the seizure of goods in execution is said to be a satisfaction, *pro tanto*, of the plaintiff's judgment, unless without fault of his own he is deprived of the fruit of his levy: *Duncan v. Harris*, 17 Ser. & Raw., 435; *Lyon v. Hampton*, 20 Pa. St., 46.

In every point of view I think the prohibitory clause of Section 5075 is inapplicable to this case, and I am constrained to dissent from the conclusion of the register.

And now, January 31, 1882, the order of the register in this matter is set aside; and it is ordered that the Eaton, Cole & Burnham Company be admitted to make proof of its claim.

By the Court.

For the appeal, *W. S. Purviance, Esq.*

For report, *Messrs. Geo. S. Crosby and J. P. Coulter.*

Court of Common Pleas, No. 1.

PORTER, DONALDSON & CO. v. C. PFLAUM,
Doing Business in Her Maiden Name of C.
STRAUSS and B. PFLAUM, Her Husband.

While a married woman may hold and trade as a shop-keeper or merchant, with any goods or merchandise that may be her separate estate, selling and replenishing her stock as needful, upon credit given her upon her separate property, and be protected from her husband's creditors, she cannot incur any debt for which she will be liable for such stock or renewal or in any ordinary business transaction, unless she be a *feme sole trader* under the Acts of 1855 and 1718.

If she is not a *feme sole trader* her creditors have no remedy against her and cannot sustain an action against her and her husband with which to charge her estate.

This was an action to recover a balance due on the sale of millinery goods to the defendant. The uncontradicted evidence showed that the plaintiffs sold a portion of the bill to the defendant before her marriage to B. Pflaum, she doing business under her maiden name of C. Strauss; that her estate, so far as the plaintiffs knew, consisted of her stock of goods in trade; that after her marriage, at her request, the credit was given and bills made to her as C. Strauss; that she continued to do business under that name; that "she continued to be the owner of such separate estate and kept up her stock of goods and carried on her trade as a dealer therein just as she had prior to her marriage;" that the goods were furnished at her "personal request, and that the same were put into her stock in trade in which she dealt and used by her to keep the same up so that she could supply her customers therefrom;" that "she continued to purchase goods from the plaintiffs after her marriage with B. Pflaum as she had done before, and that no change of terms of sale or conditions of purchase or reference to her separate estate were ever made or asked for."

There being no dispute as to the correctness of the balance claimed, the court directed a verdict for the plaintiffs subject to the opinion of the court on the question of law reserved, to wit: "Whether under all the evidence the plaintiffs are entitled to recover."

For plaintiffs, *D. F. Patterson, Esq.*
Contra, Josiah Cohen, Esq.

Opinion by STOWE, P. J. Filed February 13, 1882.

The question raised by the reserved question is, whether the defendant, a married woman, living with her husband, can carry on business in her own name as a merchant or shopkeeper (her husband being in nowise either in name, presence or act connected with the business), purchase goods upon her sole credit and that of her own personal estate and make herself liable in an action for debts thus incurred?

By the common law the husband and wife were regarded as one person and her legal existence and authority were in a great degree suspended during the continuance of the marriage relation. The general rule was that a married woman could not make a binding contract and neither she nor her husband could be sued upon her contracts unless ratified or assented to by him. Her real estate became his for life and her goods, chattels and claims, or rights in action were his absolutely if he chose to take them into his possession.

The husband, however, was liable for the

debts contracted by his wife before marriage, if sued for them during coverture. He was also bound to provide his wife with necessaries suitable to her station and his condition in life, and if she contracted debts for them during cohabitation he was obliged to pay them. He was also liable for the torts and frauds of his wife during coverture.

By the Act 22d February, 1718, it was declared that, "Where any mariners or others are gone, or hereafter shall go to sea, leaving their wives at shopkeeping or to work for their livelihood at any other trade in this province, all such wives shall be deemed and are declared to be *feme sole* traders," etc., and by the act they could sue and be sued without their husbands being named, and where judgments were obtained against them executions were allowed against the goods and chattels in their possession or held in trust for them, etc., etc., with other provisions not necessary to recite in this inquiry.

This was the status of the law in Pennsylvania when the Act of 11th April, 1848, was passed. That act provides that "Every species and description of property, whether consisting of real, personal or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman as fully after her marriage as before, and all such property of whatever name or kind which shall accrue to any married woman during coverture, by will, descent, deed of conveyance or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property and the said property, whether owned by her before marriage, or which shall accrue to her afterwards shall not be subject to levy and execution for the debts and liabilities of her husband, nor shall such property be sold, conveyed, mortgaged, transferred or in any manner incumbered by her husband without her written consent first had and obtained and duly acknowledged before a judge of the Common Pleas Court, that such consent was not the result of coercion on the part of her husband, but that it was given voluntarily and of her own free will; *Provided*, that her said husband shall not be liable for the debts of the wife contracted before marriage, and *provided*, that nothing in this act shall be construed to protect the property of such married woman from liability for debts contracted by herself, or in her name by any person authorized so to do, or from levy and execution on any judgment that may be recovered against a husband for the torts of the wife, and in such cases execution shall be first had against the property of the wife."

The act further provides, "In all cases where debts may be contracted for necessities for the support and maintenance of the family of any married woman, it shall be lawful for the creditor to institute suit against husband and wife for the price of such necessities, and after judgment have an execution against the husband alone, and if no property of the said husband be found * * * an *alias* execution may be issued which may be levied upon and satisfied out of the separate property of the wife, secured to her under the provision of this act; *Provided*, that judgment shall not be rendered against the wife in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the wife or [held by the Supreme Court to mean "and"] incurred for articles necessary for the support of the family of the said husband and wife."

On the 4th of May, 1855, it was enacted that "Whenever any husband from drunkenness, profligacy or other cause shall neglect or refuse to provide for his wife or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader under the Act of 22d February, 1718, and be subject as therein provided, and her property, real and personal, *however* acquired, shall be subject to her free and absolute disposal during life, or by will." And by the Act of 3d April, 1872, the separate earnings of any married woman, whether for labor, salary, property, business or otherwise, will accrue to and inure to the separate benefit and use, and be under the control of such married woman independently of her husband, and so as not to be liable to his creditors in all cases where such married woman has presented her petition to court stating her intention of thereafter claiming the benefits of that act and had the same duly filed.

When the Supreme Court first undertook to interpret the Act of 1848, they said it vested in a married woman the absolute right to and control of her individual property then held or afterwards acquired; that the act worked a radical change in the condition of a *feme covert*, and that she might dispose of her estate by will or otherwise as a *feme sole*: *Cummings' Appeal*, 11 Pa. St., 272, and *Goodyear v. Rumbaugh and Wife*, 13 *Id.*, 480. But in *Trinmore v. Heagy*, 16 Pa. St., 484, the court took a step backwards, and held that the separate deed of the wife was absolutely void, and *Calwell v. Walters*, 18 *Id.*, 79, decided that a bond and warrant of attorney by husband and wife was void as to her, CHAMBERS, J., in the opinion, saying: "Public sentiment has been manifested by legislation in favor of extending and protecting the rights

of *feme coverts* over their estates, but it would be to little purpose if the liability of wives by bond or authority to confess judgment, will give effect to a judgment that will operate to divest her real estate." In *Raybold v. Raybold*, 20 Pa. St., 308, it is also said: "True, by the Act of 11th April, 1848, all property which shall accrue to any married woman shall be owned, used and enjoyed by her as her separate property." But "savings out of the family purse, furnished and replenished by the husband, are not property that *accrues* to the wife within the meaning of the act. The Legislature have not extinguished quite all of the marital rights of the husband. He is still entitled to the person and labor of the wife and the benefits of her industry." LEWIS, J., in *Mahon v. Gormly*, 24 Pa. St., 82, decided in 1855, declares "the Act of 11th April, 1848, was intended for protection of married women and not for their injury, and must receive such a construction as shall promote that object. It was not intended to clothe her with the unlimited power of a *feme sole*, so that she might *embark in trade*, incur liabilities without her husband's consent as surety for strangers, or borrow money for speculation at usurious rates. The proviso, that the act shall not be construed to protect her property from debts contracted by herself, etc., may have ample operation by confining it to torts, to debts contracted before marriage, and to liabilities necessarily incurred in the management of her estate and for necessities for the support and maintenance of the family. Beyond these liabilities she stands under the protection of the common law. In general, therefore, a married woman is incapable of contracting debts, and a plaintiff who seeks to recover should bring his case under some one of these exceptions."

Glyde v. Keister, 32 Pa. St., 85, declares "That the Act of April 11, 1848, does not remove the wife's disability resulting from the marriage relation to *enter into a contract*. Her right to use and enjoy is enlarged but not her power of disposition. She can make no contract now which she could not make before the Act of 1848. The purpose of the act was not to make her a *feme sole* trader as to the right of disposition and encumbrance of her property, but to secure her in its undisturbed enjoyment. It is a shield against the husband and his creditors. It is true that it declares that it shall not be construed to protect her property for debts contracted by herself, but this has reference only to debts contracted by her before marriage and debts contracted for necessities for the support and maintenance of the family."

In *Petit v. Fritz's Executors*, 33 Pa. St., 120, WOODWARD, J., in speaking of the construction given the act in *Cumings' Appeal* and *Good-year v. Rumbaugh*, says: "It was impossible to shut our eyes upon the consequences of such a construction. It would work a repeal of our old statutes of conveyancing; it would change the law of actions, and it would expose wives continually to the hazards of barter and business, without that aid and protection which the common law entitled her to receive from her husband." So in *Steinman v. Ewing*, 43 Id., 67 [1862], READ, J., says: "The policy of the Act of 1848 was to secure the property of married women, and for that very purpose it expressly limited the objects for which debts could be contracted that would bind their separate estates, nor are we disposed to extend the list so as to induce them to enter into speculation in the purchase and sale of real estate," and in *Robinson & Co. v. Wallace*, 39 Id., 129, THOMPSON, J., says: "She [a married woman] has no power to contract for the purposes of trade."

In *Wieman v. Anderson*, 42 Pa. St., 317, we come to another line of cases which has been strongly urged upon us as indicating and portending another change in the views of the Supreme Court upon this statute, and a return to the doctrine expressed in *Cumings' Appeal*. It is there held that a married woman may have a stock of goods in her own right, trade with them and with the proceeds buy other goods to be held and traded with, and they be exempt from seizure for her husband's debts. And while it is true, the general terms of the opinion would seem to indicate that the court meant that in such a case married women were to be treated as merchants, it is very clear that the only question before the court was the use and enjoyment by married women of merchandise, as merchants as against the creditors of the husband and not their liability in an action for their price when purchased on credit, and in view of the numerous cases in which a different doctrine has been declared, the case cannot be so understood. On the contrary, *Brown v. Pendleton*, 60 Id., 422; *Bucher v. Ream*, 68 Id., 421; *Silven's Ex'r v. Porter*, 71 Id., 451; *Smith v. Kaler*, 76 Id., 267, and *Sixber v. Boner*, 91 Id., 151, show that the questions involved and decided were only in reference to the right of the wife to hold property against her husband's creditors quite apart from any consideration of her liability for her contracts. STERRETT, J., in the last case cited, emphatically declares in regard to their purchase, that the fact that the note she gave for the consideration was not legally bind-

ing upon her or her estate is of no consequences. And in *Cleaver v. Sheetz*, 70 Id., 500, decided long after *Wieman v. Anderson*, and since *Brown v. Pendleton* and *Bucher v. Ream*, AGNEW, J., expressing the same view, says: "The Act of 1855 [in reference to *feme sole traders*] does not repeal the Act of 1848. The Act of 1848 being a general law, regulating the condition of married women, strengthens the position that they cannot be made liable for debts unless engaged in trade or business, according to the terms of the Act of 1718." And in *Berger v. Clark*, 79 Id., 343, the court say: "In general a married woman is incapable of contracting debts. Hence, in interpreting the special clauses of the act relating to debts for which she may be held liable, the cases show that they have been construed so as to *limit them strictly* to the purpose of protection, and not loosely, so as to expand her contract capacity or liability."

Notwithstanding the exceeding looseness with which the judges delivering some of the foregoing and other opinions have occasionally expressed themselves in discussing the powers of married women, the judgments entered and the remarks made, when read with a reference to the facts of the respective cases, are not perhaps subject to so much criticism as they would otherwise appear to deserve, and however much uncertainty there may have been at one time, it is now, I think, finally settled, that while a married woman may hold and trade as a shopkeeper or merchant, with any goods or merchandise that may be her separate estate, selling and replenishing her stock as needful, upon credit given her upon her separate property, and be protected from her husband's creditors, she cannot incur any debt for which she will be liable for such stock or renewal or in any ordinary business transaction, unless she be a *feme sole trader* under the Acts of 1855 and 1718; and, therefore, if she engages in merchandising, except as suggested, her creditors have no remedy against her and cannot sustain an action against her and her husband with which to charge her estate. Indeed, any other interpretation of the act would not only subvert all our ideas of the relative position of the husband and wife in the marriage relation, but would give the latter, without and even against the consent of her husband, the right to jeopardise not only her property by involving it in the hazards of business, but actually compel him to stand as her surety in any enterprise she might see fit to engage in.

Judgment for defendant, non obstante veredicto.

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PITTSBURGH, PA., FEBRUARY 22, 1882.

Supreme Court, Penn'a.

COMMONWEALTH OF PENNSYLVANIA, to
use of OIL CITY SAVINGS BANK, Plaintiff
Below, v. GEO. WALTER, JACOB KECK et al.

The sheriff of Butler county sold real estate on a *testatum fieri facias* from Venango county, received the purchase money and sent it to the prothonotary of Venango county, who paid it to the plaintiff in the writ. In a suit by a prior judgment lien creditor against the sheriff and his bondsmen, *Held*:

1. That the sheriff had an undoubted right to pay the money into the court of his own county or of Venango county. [Approving *Borlin's Appeal*, 28 PITTSBURGH LEGAL JOURNAL, 412.]
2. That payment to the prothonotary of Venango county was not payment into court, and that therefore the defendants were liable.
3. The only way in which money made on execution process can regularly go into the hands of the prothonotary, is by first obtaining leave of court to pay it into court.

Error to the Court of Common Pleas of Butler county.

Opinion by STERRETT, J. Filed January 2, 1882.

After the defendant Walter, as sheriff of Butler county, acknowledged and delivered his deed to the purchaser for the land sold on the *testatum fieri facias*, and received the purchase money therefor, he had an undoubted right to pay the same either into the proper court of his own county or into the Court of Common Pleas of Venango county, whence the writ issued: *Borlin's Appeal*, 28 PITTSBURGH LEGAL JOURNAL, 412. By so doing, he would have avoided all risk. It would then have been the duty of the court, into which the money was paid, to distribute the same to the parties entitled thereto. In no other way could the sheriff relieve himself from responsibility. He had the right to distribute it himself; but if he undertook to do so, he incurred the risk of misapplication and consequent liability on his official bond: *Luce v. Snively*, 4 Watts, 396; *In re Bastian*, 9 Norris, 472; *Franklin Township v. Osler*, 10 *Id.*, 169. Instead of paying to the party entitled, or into either court, the sheriff returned the writ and paid the money to the prothonotary of Venango county, who in time paid it to the plaintiff in the *testatum*, to the prejudice of the Oil City Savings Bank, which had the first lien on the land out of which the fund was realized.

This was all done without the intervention or even the knowledge of either the court of the *situs* or the court whence the writ issued. In no proper sense of the term can this be considered a payment of the money into the Court of Common Pleas of Venango county. To sanction such a practice would be productive of great mischief. If the sheriff has money, which, in obedience to the command of his writ, he wishes to bring into court, it is his duty to have the matter brought to the attention of the court, so that it may be fully advised, and take such action as may be proper in regard to the distribution of the money and its safe keeping in the meantime. The recognized and proper practice in such cases is for the sheriff or his deputy to appear in person or by attorney and by leave of court, first obtained, pay in the money. This being done, the prothonotary, as the officer and representative of the court, acting under its authority, takes charge of the fund subject to the special or standing orders of court in regard to its safe custody and ultimate disbursement. This is the only way in which money made on execution process can regularly go into the hands of the prothonotary. His authority to receive and receipt for money in any other way is quite restricted. In *Watson v. Smith*, 2 Casey, 395, it was held that as a matter of public convenience, sanctioned by an almost universal practice, a suitor may lawfully pay, to the prothonotary, fees due to a former incumbent of the office; and as a necessary consequence his sureties are liable therefor. But the prothonotary has no power to receive payment of a judgment, and he who makes such payment does so in his own wrong: *Tomkins v. Woolford*, 1 Barr, 156. And, in *Wells v. Baird*, 3 *Id.*, 351, it was held that money paid to the prothonotary and entered by him on his docket, as paid into court, will not affect the right of the plaintiff to have the judgment revived.

There appears to be no question as to the *bona fides* of the sheriff in this case, and it is to be regretted that he and his sureties must be adjudged liable, as for a misapplication of the money; but it is the inevitable result of his failure to relieve himself of responsibility in either of the modes recognized by law.

Judgment reversed, and judgment is now entered on the verdict against the defendants, in favor of the Commonwealth for eight thousand dollars penalty of the bond, and in favor of the Oil City Savings Bank four hundred and twenty-eight dollars and thirty-five cents damages.

For plaintiff in error and below, *Messrs. F. W. Hays and J. D. McJunkin.*

Contra, Messrs. C. Walker and F. M. Eastman.

APPEAL OF MARY ANN McALEER.

A. conveyed certain real estate to B., who immediately reconveyed it to A., in trust to permit A.'s wife C. to receive the rents for the maintenance of herself and her children, and in case of her death before A., or her marriage after A.'s death, then said real estate to vest in the children of herself and A., lawfully begotten, with power to A., at any time, to sell the said real estate to any person for such sum of money as he might deem for the best interests of his children or their heirs. A. and his wife C. subsequently executed a mortgage upon said real estate, and sometime afterwards A. died. The mortgage was foreclosed after his death and the real estate sold for more than enough to satisfy the mortgage. Held, that the power of sale was for the benefit of the trust, and that C., who had been appointed trustee in place of A., was entitled to the balance of the fund.

Appeal from the decree of the Court of Common Pleas, No. 2, of Allegheny county.

Daniel McAleer, who was the owner of certain real estate in the city of Pittsburgh, conveyed the same by deed, dated January 27, 1866, to John Callaghan, who immediately reconveyed the same to McAleer in trust to permit his wife, Mary McAleer, to receive the rents for the maintenance of herself and children, and in the event of the death of said Mary McAleer before Daniel McAleer, or her marriage after his death, then in trust for the said children until their arrival at the age of twenty-one years, and then said real estate to vest in said children in fee simple, with power, nevertheless, to the said Daniel McAleer, the natural guardian of his said children, at any time hereafter, to sell and convey the said real estate to any person for such sum of money as he might deem best for the interest of his children.

Daniel McAleer and his wife subsequently executed a mortgage upon the said real estate, upon which the property was subsequently and after the death of Daniel McAleer, sold at sheriff's sale for more than enough to pay the mortgage debt. After the death of McAleer and before the said sheriff's sale, John C. Bindley recovered a judgment against Daniel McAleer's administrator, and also against the widow and heirs of the said McAleer, and claimed payment of his judgment out of the surplus arising out of the sheriff's sale.

Jacob F. Slagle, Esq., was appointed auditor to distribute said fund, and filed his report appropriating sufficient of said fund to Bindley's judgment, and the remainder to Mary McAleer, who had been appointed trustee in place of Daniel McAleer, deceased.

It was admitted that the conveyances were voluntary and without consideration that Daniel McAleer was solvent at that time, and that at his death he had no estate. Upon exceptions

filed, the court below confirmed the report of the auditor, from which Mary McAleer, trustee, appealed.

For appellant, *Messrs. Bruce & Negley*.

The power of sale was intended for the benefit of the trust. McAleer had no interest in the property, and Bindley being a subsequent creditor could not question the validity of the trust. McAleer being free from debt at the time, had the right to settle the property for the benefit of his family.

Contra, Messrs. Knox & Reed.

The power of sale was intended to reserve to McAleer control of his property. Its exercise by executing the mortgage made the property assets for the payment of his debts: *Talmadge v. Sill*, 21 Barbour, 34; 2 Sugden on Powers, 27. McAleer retained such control of this property as to make the deed a fraud upon his creditors: *MacKason's Appeal*, 6 Wright, 330. A power of sale may be executed by a mortgage: *Lancaster v. Dolan*, 1 Rawle, 231.

Opinion by TRUNKEY, J. Filed November 21, 1881.

By deeds executed January 27, 1866, the naked legal title to the land was vested in Daniel McAleer, in trust that his wife, Mary Ann, should have the rents, issues and profits during her life, unless in case of her widowhood she should marry again, and after her decease, or such marriage, their children shall have the rents and profits during their minority and on their arrival at the age of twenty-one years to them and their heirs. Power was given to the trustee to sell and convey the whole or any part of the land, at any time, and for such prices as he should deem best for the interest of his children.

McAleer had previously owned the land, and it is admitted that he was not indebted or contemplating liabilities so as to make the deed void as to creditors. It is conceded that he had the right to create the trust in favor of his wife and children, and himself be the trustee. He mortgaged the premises, and he could have done this only by virtue of the power contained in the trust deed. The fund in controversy arises from sale of the mortgaged premises, and the appellee claims that in reality McAleer owned the land at and before the time of the sale.

McAleer was a mere trustee, without interest in the premises, and had no power other than to sell. He made an absolute gift of the land to his wife and children. In equity the entire estate was vested in the children of "said Daniel McAleer and Mary Ann McAleer, begotten," subject to the use of their mother during her

life or widowhood. We are unable to adopt the view of the learned auditor, to wit: "In case she survived her husband and died unmarried there is no provision in the deed for the children, and the estate would then revert to Daniel McAleer's heirs." This is too strict a reading of the deed, avoiding its plain intent and the clear meaning of the language used, namely, that the children shall take the use immediately after their mother's death, or before, should she become a widow and marry. Had McAleer's wife died before him, and the power not exercised, at once they would have come into the enjoyment and use of their estate, and so will they if the widow marries, by the express terms of the deed; the necessary implication is, that they shall have it if the widow dies unmarried.

The power having been exercised, the proceeds of the land belong to the same persons, subject to the same uses, as did the land itself. The interest, or use, of the money belongs to them who were entitled to the rents, or use, of the land, and the omission to express in the deed that in case of sale the same persons should receive the interest of the money who were entitled to the rents of the land, will not defeat the purposes of the trust. Conversion gave the trustee no interest in the money, no power of appointment, no right of disposition for his own benefit, and will not deprive the owners of their property.

Decree reversed, and it is now considered and decreed that the money in court, less costs of audit, be paid by Mary Ann McAleer, trustee. Costs of appeal to be paid by the appellee, J. C. Bindley.

Court of Common Pleas, No. 1.

McMAHAN v. FRIEND.

A rule to arbitrate is taken in time if more than thirty days previous to the Saturday at which a case is ordered on the weekly trial list.

The provisions of the 10th Section of the Act of June 13, 1836, in reference to arbitrations, construed in reference to the practice of this court.

Action of trespass. In this case suit was commenced by summons and declaration filed February 5, 1881. Pleas were filed July 19, 1881, and on the same day the plaintiff's attorney ordered the case to be put on the issue docket. A rule to choose arbitrators was taken by the defendant on November 21, 1881, and on December 7, 1881, arbitrators were chosen to meet December 19, 1881.

During the month of August, 1881, the prothonotary prepared a trial list composed of cases

then on the issue docket, among which was this case. The court on convening in the month of September, 1881, commenced to call cases from the new trial list, setting down a number therefrom on Saturday for trial during the following week. Up until the time at which the rule to choose arbitrators was taken, the case had not been called or placed upon the weekly list. On December 10, 1881, on motion of plaintiff's attorney a rule was granted on defendant to show cause why the rule to choose arbitrators should not be stricken off for the following reasons:

1. Said rule was taken out and entered within thirty days after said case appeared on the present trial list, and whilst the said court was sitting and trying causes on said list, contrary to the Act of Assembly of June 13, 1836.

2. The said court was sitting, the said case was on trial list, No. 34 of said court from which list cases were being tried when said rule was entered.

For the rule, *Winfield S. Wilson, Esq.*

Contra, Messrs. Knox & Reed.

Opinion by STOWE, P. J. Filed February 6, 1882.

The question in this case is, "What is the proper construction of the 10th Section of the Act of June, 1836, in reference to arbitrators under the practice of this court?" The act declares "That no suit or action which shall be set down for trial at any court shall be referred (except by the consent of counsel) within thirty days before, nor during the sitting of such court, unless such suit or action shall have been continued to the next term."

This act in its application to the most of the courts in the State, where they hold court from term to term, is easy and plain enough, but where there are continuous sittings for some nine months in the year, and no regular adjournment from term to term or court to court at any time, we are compelled to adopt some rule applicable to our practice as nearly in accordance with the act as possible. An actual compliance is utterly impracticable, if we are to hold that the court is to be regulated by the terms. Our court trial lists are made out in numbers of two hundred, as they may be needed from time to time from a general list in the office of the prothonotary, on which all cases are set down for trial as soon as they are at issue, and from these court lists are taken a special list on each Saturday for trial on the following week, and until the weekly list is made out parties are not expected to be ready for trial. It seems, therefore, reasonable that we should treat the weekly

list as the one in which the cause in the language of the act is "set down for trial," and hold that it is only within thirty days from this date that the distinction in the act applies. This will give us a perfectly plain and simple rule, which will prejudice no one and carry out the spirit of the act, which is that a compulsory arbitration shall not be had where less than thirty days will or may intervene before a trial can be had in court, but that it may be had in other cases.

This view of the case makes it our duty to discharge the rule.

Orphans' Court.

In Re Estate of EMMA WAUHOU, Minor.

F., guardian of E., paid the debts of S., the mother of E., out of the rents of real estate devised by S. to E. Held, that F. was entitled to credit for these payments on the settlement of his account as guardian.

The estate of a deceased *feme covert*, whose surviving husband is insolvent, is liable for debts contracted by her for necessities and for her funeral expenses.

Horton's Appeal, 28 PITTSBURGH LEGAL JOURNAL, 25; 8 W. N. C., 495, distinguished.

Andrew Wauhoup died January 3, 1869, leaving to survive him his widow, Eliza Jane Wauhoup, and one child, Emma Wauhoup, the minor. Mrs. Wauhoup married Thomas Sweeny in August, 1871, and died March, 1872, testate, leaving surviving her her husband, Thomas Sweeny, and her daughter Emma.

She directed in her will that her funeral expenses and doctors' bills should be paid, and made some special bequests of household effects, and a bequest of a legacy of one hundred dollars to her husband. The remainder of her estate she devised and bequeathed to her daughter Emma, and appointed her aunt, Mrs. Gusellah Stewart, executrix of her will.

Mrs. Sweeny's personal estate amounted to \$71.45, and was applied by the executrix to the payment of a portion of her debts.

Samuel Farley, who was appointed guardian of the minor, October 26, 1872, entered into a verbal agreement with the executrix and the creditors of Mrs. Sweeny, who had not been paid, to pay them, the decedent having died seized of a house and lot, the rent of which he was collecting for his ward.

In pursuance of this agreement the guardian paid out of the rents of said real estate the following debts which had been contracted by the decedent while she was the widow of Andrew Wauhoup, to wit: John Hutchinson's bill,

\$20.83; Alderman Crist for Doctor Warner, \$16; William Ross, \$43.98; J. S. Marshall, \$5.98; Doctor McCarroll, \$2.50; E. Burns, \$20.12; and the following debts which were for necessities furnished the decedent at her instance after her marriage to Thomas Sweeny for the support and maintenance of her family: Eliza Fair, \$14.50; Doctor McCarroll, \$42.50; E. Burns, \$20.12, and the expenses of her funeral, \$122.20. To which payments exceptions are filed. Thomas Sweeny had not at the time of his wife's death and has not had since, any estate or property except his interest in his wife's estate. He was not paid the legacy bequeathed to him in his wife's will, and had not received any of the rents of her real estate.

Mrs. Sweeny appointed Mrs. Stewart testamentary guardian of her daughter Emma. After her mother's death Emma, who was then about eight years of age, refused to live with Mrs. Stewart, and at her request was taken, in March, 1872, to Mr. Farley's house. His wife was her mother's cousin. She lived with them until September, 1879, when Mr. Farley, alleging that she was incorrigible, had her sent to Morganza. She went to the public schools while living with Mr. Farley, and when not at school, for a part of the time she lived with him, did some work about the house. The guardian kept an account with his ward in which he charged her at or near the time they were paid with amounts paid for her clothing and school books. On the 26th of April, 1881, he entered in this account a charge against his ward for boarding and washing for five years at \$3 per week, of \$780, and two and a half years at \$2 per week, \$260, for which he claims credit in his account and to which exceptions are filed.

Opinion by OVER, J. Filed January 14, 1882.

The claims against the estate of Eliza J. Sweeny, paid by the guardian, may be divided into three classes: (1) Debts contracted by her when a *feme sole*; (2) debts contracted by her for necessities furnished for the support and maintenance of her family when a *feme covert*; (3) her funeral expenses.

It is contended, as to all these claims, that even if her estate was legally liable therefor, that the guardian had no authority to pay them, and that he should not be allowed credit for the payments.

As a general rule a guardian has no authority to pay the debts of a decedent. But there are exceptions to this rule like all other general rules. It would have been necessary for the executrix of Mrs. Sweeny's will to have sold all of the real estate of the decedent for the pay-

ment of her debts. Had she made application to the court for an order to sell the same, and the guardian had appeared in court and shown that it was for the best interests of his ward that the real estate should not be sold, and that he could make an agreement with the creditors to pay them and thus save the real estate for his ward, it would certainly have been the duty of the court to have refused to grant the order for sale and to authorize the guardian to enter into and carry into effect the agreement. In this case the guardian by entering into such an agreement and carrying it into effect, preserved the real estate for his ward, and there is no doubt the results were highly beneficial to her estate. It is true there was no order of court. But equity treats that as done which ought to be done. And as an order of court would have been granted if applied for, the court can now consider the guardian as having acted under its order. It follows then that the guardian is entitled to credit for the payment of such claims as the decedent's estate was legally liable for.

It is conceded that her estate was liable for the first class of claims, and there can be no doubt that it was also liable for the second and third classes. The second class were debts contracted by her while a *feme covert*, for necessities furnished for the support and maintenance of her family. And her husband was insolvent. The third class was for her funeral expenses, which she directed in her will should be paid.

It is true the provisions of the Act of 11th of April, 1848, establishing the mode of procedure by which the separate estate of a *feme covert* could be made liable for debts contracted by her for necessities was not complied with. But they could not be. The wife being dead a joint action could not be brought against husband and wife, and an execution could not first go out against him and then against her. It may be these claims are not within the letter of the act, but they are certainly within its equity and spirit: *Davidson v. McCandlish*, 89 Pa. St., 172; *Baers' Estate*, 60 Id., 435.

The fact that Mr. Sweeney, the surviving husband, was liable for these claims, and that they were paid out of rents which he might have claimed, as tenant by the curtesy, is perhaps of itself a sufficient reason for allowing the guardian credit for their payment.

The exceptions filed to the payment of these claims are therefore dismissed.

Objections are made to the allowance of the credits claimed by the guardian for the maintenance of the ward for two reasons: (1) It is

alleged that he placed himself *in loco parentis* to her; (2) it is claimed that her services in his family were worth her maintenance.

There is a marked distinction between this case and *Horton's Appeal*, 28 PITTSBURGH LEGAL JOURNAL, 25, which exceptant cites in support of the first reason. In that case the guardian made no charges against his ward whatever. She was the niece of his wife, and he frequently made declarations that he had taken her as one of his own children, and his whole conduct tended to show that he had placed himself *in loco parentis* to her. Here the guardian kept an account book in which he entered charges against his ward for clothing furnished her and money paid for her school books at or soon after it was furnished and paid. Whilst he did not make any charges for her boarding for a year and a half after she had left his house, yet the fact that he made the charges he did indicates that it was not his intention to place himself *in loco parentis* to his ward. The relationship existing between the ward and the guardian's wife is also very remote, and he made no declarations that he took her as his child. The evidence does not show that the guardian placed himself *in loco parentis* to his ward. He is therefore entitled to be credited for the cost of her maintenance unless her services were of sufficient value to pay for the same.

It appears from the testimony that for the first four years and a half the ward lived with the guardian her services were not of much value to him, and there is no evidence fixing what they were worth, if anything. The guardian charges her for boarding and her washing for that time at the rate of three dollars per week. The evidence shows that two dollars and a half per week would be a reasonable charge, and is all, therefore, that can be allowed him. Three disinterested witnesses who lived near the guardian and saw the ward working, testify that for the last three years she lived with him her services were worth her boarding and such clothes as she got. Whilst on the part of the guardian evidence was given tending to show that her services during that time were of little or no value, that she was disobedient and did not come home from school until late in the evening and went out at night. The guardian allows her in his account credit for her services for the last two years at the rate of one dollar per week. The evidence in regard to the value of her services for these three years is so conflicting as to make it difficult to determine the proper amount to be allowed. But the weight of the evidence indicates that her services dur-

ing this period were worth her boarding, washing and clothing.

The guardian then is to be allowed for the boarding and washing of the ward for a period of four and one-half years, or two hundred and thirty-four weeks, at \$2.50 per week, \$585. His total charges in his account for boarding and washing are \$1,040, making an overcharge of \$455, with which he is to be surcharged. He charges for clothing furnished his ward during the last three years, \$56.60, which is not allowed and is to be surcharged. He claims credit for \$25 paid Alderman Crist for Doctor Warner's bill against Mrs. Sweeny's estate. The alderman represented to the guardian that the amount of the bill was \$25, when in point of fact it was but \$16. The guardian is only entitled to credit for payments of claims for which her estate was liable, and is therefore to be surcharged with nine dollars improperly paid on this claim.

For accountant, *D. W. Bell, Esq.*

For exceptants, *W. A. Stone, Esq.*

IN MEMORIAM.

Action of the Bar of Allegheny County on the Death of Hon. Samuel A. Purviance.

A very fully attended meeting of the Bar was held on Wednesday afternoon last in one of the Common Pleas Court rooms to take action on the death of the Hon. SAMUEL A. PURVIANCE, which occurred in Allegheny City on Tuesday morning. The meeting was organized with Hon. W. G. HAWKINS, President Judge of the Orphans' Court, in the chair and George Shiras, Jr., Hill Burgwin, A. M. Brown and Malcolm Hay, Esq's, as Vice-Presidents. Secretaries—S. A. McClung, F. M. Magee and David W. Bell, Esq's. When the object of the meeting had been announced by the chair, Thomas M. Marshall, Esq., moved that a committee of five be appointed to draw up an expression of the sentiments of the Bar. The motion being agreed to, Mr. Marshall, J. H. Hampton, S. H. Geyer, M. Swartzwelder and W. B. Negley, Esq's, were appointed.

While the committee was preparing the minute, Judge EWING recounted the many noble qualities of the deceased, and spoke of him as one of the ablest and most capable members of the bar.

Mr. Marshall, on behalf of the committee, presented the following minute:

The sad event which brings us together is not the sudden, startling call of one untimely taken, unprepared and without warning of the approach of the solemn messenger—it is the appropriate finish and earthly close of a life spent in duties well performed.

The death of SAMUEL A. PURVIANCE was not unexpected. We had missed him from his accustomed professional walks. His place among the seniors of the profession had been vacant for years. After more than half a century of assiduous, persevering and honorable labor, he had found rest in the placid retirement of a happy and tranquil home, where kindly hands waited to meet his wants, and warm and loving hearts solaced the evening of his days. The last few years of life were unobtrusive and quiet, but the interest and force of his friendship never abated. It is fit that some proper memorial of a just and good man should be recorded by his brethren of the bar. SAMUEL A. PURVIANCE was born in the adjoining county of Butler, of a well-known and honored ancestry. While yet in the years of infancy he was deprived by death of a father's protection, guidance and direction. Left to struggle with life's necessities, he soon developed the hopeful, kindly, yet resolute and courageous attributes of character which endeared him to hosts of warm and loving friends. He early took upon himself the burdens of life incident to supporting and cherishing those bound to him by ties of blood and kindred. Admitted to the Bar, he soon obtained honorable distinction. His practice extends over a range of ten counties in Northwestern Pennsylvania, reaching from Warren, on the headwaters of the Allegheny, to the Ohio. In this extended and varied field of professional labor, he came in contact with some of the first and greatest minds of the profession of the law; names familiar to every student: Baldwin, Forward, Shaler, Fetterman, Pearson, Banks, Ayres, Thompson and Agnew. All these have preceded him to their rest save John J. Pearson and Daniel Agnew.

A single peculiarity of his practice needs comment. He had always faith in his cause and client. This came of a singularly pure element of his own character; he thought no evil of others. That he enjoyed the confidence of the people was evinced by the marks of favor bestowed. First, District Attorney; in 1837, elected to the Convention to amend the Constitution of the State; in 1838, elected to the State Legislature; to the National Legislature, representing the county of Butler and the northwestern portion of the county of Allegheny. In 1859, removing to Pittsburgh for the practice of his profession, he was called to the Attorney-Generalship of the Commonwealth, and he closed a political career of a varied and honorable distinction by being chosen to represent Allegheny county in the State Convention to amend the Constitution of 1837. In all these political positions he was distinguished for large ability and clear integrity.

While we bear willing and hearty testimony of the learning, accuracy and accomplishments of our deceased friend and brother as a member of our profession; while we point with just satisfaction to his honorable and distinguished career as the recipient of public confidence, with still greater satisfaction we record our testimony of the purity and worth of his private life, the truthfulness, sincerity and sanctity of his friendship.

In more than three-score years and ten of life, he leaves no page behind him which his friends would desire folded or concealed from the sharpest scrutiny of observation. He was an honest, just and pure-minded man; learned in his profession, just in its exercise. Faithfully fulfilling the duties of life, he has gone to his rest.

Brief addresses were made by Mr. Marshall, John McClowry, A. M. Brown and J. H. Baldwin, Esq's. The minute was unanimously adopted, and the officers of the meeting were ordered to have it engrossed and presented to the family.

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No. 29.

PITTSBURGH, PA., MARCH 1, 1882.

Supreme Court, Penn'a.

AGNES C. WALKER, Plaintiff Below, v. THE MARINE NATIONAL BANK.

The confession of a judgment to a *bona fide* creditor, even though it have the effect of giving him a preference over other creditors, is not a fraudulent disposition of an insolvent estate.

A., a member of a firm, gave his individual note to B. for the price of land, which was subsequently sold by A., and the proceeds used in the firm business. Afterwards the firm confessed judgment to B. for the amount of the note.

Held, that B. was a *bona fide* creditor of the firm.

Held further, that, as the money went into the firm and was used for its exclusive benefit, though this would not make the firm liable to the lender, and though the obligation might be repudiated as a firm debt, yet it would be a good consideration to support a subsequent promise of the firm to pay, and a judgment confessed on such assumption is not fraudulent as to creditors.

Siegel v. Chidsey, 4 Casey, 279, followed.

Error to the Court of Common Pleas of Erie county.

This was a feigned issue to February Term, 1881, to determine whether a judgment note given by William M. Caughey, Thomas M. Walker and C. J. Caughey, partners as Caughey, Walker & Co., to Agnes C. Walker, was given and received with the fraudulent intention of delaying or hindering the Marine National Bank of Erie in the collection of a judgment held by it against the above named firm. The facts were as follows: In 1865 William M. Caughey was engaged in business in the city of Erie under the firm name of Clemens & Caughey, which was succeeded by various firms in all of which Caughey's name appeared as partner. In the year mentioned he gave his daughter (subsequently married to Thomas M. Walker, at present the plaintiff in this case), his individual note for \$1,200, being the equivalent for a lot he had given her, and put the money received from the sale of the lot in question, with a larger amount received from the sale of other lots, into the firm to which he then belonged, receiving credit on the books of the company. This sum was used by the firm that received it, down through the succeeding firms to and including the firm of Caughey, Walker & Co. On October 1, 1879, the members of this

firm, of whom William M. Caughey was one, gave to Agnes C. Walker a judgment note for \$1,936—the amount of the note, given her by William M. Caughey with interest—on which judgment was entered. Previous to the giving of this note to Mrs. Walker, the said Marine National Bank had begun suit in the United States Court, for the Western District of Pennsylvania, to enforce the payment of a debt due the bank by the firm of Caughey, Walker & Co., and on October 7, 1879, obtained judgment. An execution was issued on this judgment and the real estate of the firm and of the individual members was sold. The personal assets and real estate of the firm being exhausted by execution and prior lien creditors, Mrs. Walker sought to recover her judgment from the money made out of the sale of the real estate of the individual members; to which she claimed to be entitled by reason of the priority of the lien of her judgment over that of the Marine National Bank. The plaintiff requested the court to charge, *inter alia*, that even if the note was given with fraudulent intent to binder and delay the bank, it would not prevent plaintiff from recovering unless it be affirmatively shown that she knew of such fraudulent intent, which the court affirmed, with the qualification that if the note was procured by William M. Caughey, acting on behalf of his daughter, and she adopted the transaction, she must be considered to have known whatever he knew as to the purpose for which the note was given. Verdict and judgment thereon having been rendered for the defendant, the plaintiff took this writ, assigning for error the answer of the court as above, and those parts of the charge which held that unless there was a debt due to Mrs. Walker by the firm, it had no right to voluntarily assume and pay it; and that under the facts, as disclosed by the evidence, the giving of the note by the firm was purely voluntary.

For plaintiff in error and below, *Messrs. D. B. McCreary and L. S. Norton*.

Contra, *Messrs. J. C. & F. F. Marshall and John P. Vincent*.

Opinion by SHARSWOOD, C. J. Filed January 2, 1882.

It is well settled that the confession of a judgment to a *bona fide* creditor, even though it have the effect of giving him a preference over other creditors, is not a fraudulent disposition of an insolvent estate. It was held by this court, in *Covanhoran v. Hart*, 9 Harris, 495, that a conveyance of land by a debtor in failing circumstances to a creditor to pay an existing debt is not fraudulent, although the parties contem-

plate that thereby the claims of other creditors will be defeated. Putting aside then all the evidence in this case that the parties confessed the judgment with the very purpose and design of securing for it a priority over the judgments of other creditors impending and about to be entered, the sole question was this: Was the plaintiff a *bona fide* creditor of the firm of Caughey, Walker & Co. at the time the judgment was confessed? She held the note of the firm. It was unquestionably good as against the firm. They could not have impeached it for fraud or want of consideration. It is certainly true that if there was no debt due from the firm to the plaintiff at the time of the giving of the note—if they had never received any consideration—they had no right to create a debt by voluntarily assuming the debt of one of the members so as to be good against their creditors. But there were facts in the case which showed that they were morally bound for the debt. They had received the money. It had entered into the business of the firm, made their purchases, paid their debts, and in equity and good conscience the plaintiff stood upon as fair a platform as other creditors who had sold them goods or advanced them money. They might undoubtedly have repudiated it as a debt of the firm. We think the learned judge below erred in his charge as complained of in the third specification of error. He held and so charged that "the money that was put into the firm by W. M. Caughey was credited to him on the books of the firm; it has become his money by loan from Mr. Walker; there was no privity between the plaintiff, Mrs. Walker, and the firm, and hence it is, we think it a mistake to say that the firm had the use of her money. It was the money of W. M. Caughey that they had the use of." We think there was error in making this fact conclusive as the charge did. The mere form of book-keeping could not change the facts of the case or alter the result. That it was not noted on the book that the money was a debt by the individual member to whom it was credited to the plaintiff—that it was a loan from her to him—surely ought not to conclude the question. All the partners knew of the fact that she held her father's note for the money, though they did not consider it a debt of the firm, as certainly it was not. It was expressly held by this court, in *Siegel v. Chidsey*, 4 Casey, 279, that where money was obtained on the personal credit of a member of the firm and the money went into the firm and was used for its exclusive benefit, though this would not make the firm liable to the creditors, yet it would be a good consideration to support the subsequent

promise of the firm to pay the debt, and a judgment confessed on such assumption was not fraudulent as to creditors. We cannot distinguish in any material point between that case and the one now before us.

No exception was taken in the court below to the order directing the feigned issue. It is not our intention to award a *venire facias de novo*, because we are of the opinion that the issue should not have been ordered. There was no fund in court which rendered a decision of the question raised by the issue necessary. Such necessity might never arise. We are informed, indeed, that there was a fund in the Circuit Court of the United States for this district, for distribution among creditors. It was for that court to direct an issue. It is plain that the court having ultimately to decide should have the settling, control and supervision of the issue. They should have the power to order a new trial if they should think the instructions of the court to the jury or their rulings upon questions of evidence erroneous or the verdict against the weight of the testimony. It is their conscience which is to be informed. They understand the nature of the fund which they are required to distribute. If, for example, that fund was raised by a sale of the separate estate of W. M. Caughey, the main question in this case could not arise, for it was beyond all doubt that the judgment was confessed for a *bona fide* debt owing by him. The entry of the judgment against the firm did not change its character. He and his separate property were still bound by it, for the judgment was several as well as joint, as all judgments against partners are. Yet on the verdict and judgment in the court below the defendants might go into the Circuit Court and insist that this finding is conclusive against the plaintiff's clear right to a priority of payment out of the father's separate property. Courts do not sit to decide hypothetical cases. It is not enough for a party invoking their decision to show that he may be interested in the question at some future time. He must have a present interest. I know of but one exception to this rule. Where a party is in peaceable possession of land he may file a bill in equity *quia timet* to remove a cloud on his title which renders it unmarketable.

In *Maynard v. Esher*, 5 Harris, 222, there was an amicable action to try in the District Court of Philadelphia a question arising in a proceeding in the Common Pleas of that county. There was no exception to the action nor assignment of error, but LOWRIE, J., said: "When issues of fact arise and a jury is demanded, the court should oversee the framing of the issues, and

order them to be tried by its own jury, and then proceed itself to determine the rights of the parties found and admitted. * * * The District Court might very properly have refused to try this wager in aid of a court that could do its own business; and we have had some hesitation in allowing it to be heard before us." In *Rowland's Estate*, 7 Penn'a Law Journal, 312; 4 Clark, 199, upon a petition ordered by the Court of Common Pleas, the District Court of Philadelphia held, that it is not competent for the court, upon the application of a third person, to vacate and annul a judgment between other parties who ask no action and attempt by the process of the court no injury to his rights, and which judgment, though fraudulent and inoperative as to him, is perfectly good as to all the world beside. There may be no impropriety in my saying that the learned President of the Court of Common Pleas, Judge KING, who had directed the application to be made to the District Court, assured me afterwards that he thought the refusal of that court to entertain the case was entirely right.

Judgment reversed.

Court of Common Pleas, No. 1.

IN EQUITY.

J. S. LUSK v. JAMES CALLERY.

Under the Act of 27th March, 1865, P. L., 38, in reference to calling parties to a suit, for cross-examination by the adverse party, applies to all actions except bills of discovery. Parties when called are subject to the same rules as other witnesses.

An objection to answering a question on the ground that it may criminate the witness, must come from the witness, *qua* witness, and not from counsels.

Bill in equity, charging, *inter alia*, that the defendants had entered into a scheme to have a judicial sale of the Pittsburgh, New Castle and Lake Erie Railroad, so that they might obtain title to it and divest the interest of the stockholders in violation of their rights, etc. The twelfth paragraph of the bill charged:

Said fraudulent and illegal scheme, as finally consummated, was only one of several at various times in contemplation of the defendant directors of said company, for the purpose of securing control of said railroad and property divested of the legal rights of its stockholders. In this connection your orator avers that at the time said sale was made there was a resolution standing upon the minute book of the directors, unanimously passed on the 14th day of August, 1879, pledging said directors to raise the sum of \$50,000 "to pay off the pressing debts and extend the road to Warrenton and Wampum," while at said time, also, said directors, who are defendants in this bill, had entered into a written agreement with others of the defendants to have the property purchased at judicial sale on their behalf and in their interest.

At a hearing before the master, the plaintiffs proposed to call the defendants as for cross-examination and ask each the following question:

Q. Did you ever see a writing, dated on or about the — day of August, 1879, purporting to be an agreement to purchase the Pittsburgh, New Castle and Lake Erie Railroad at sheriff's sale, provided it went to sheriff's sale, signed by James Callery, A. M. Marshall, Charles Gibson and others [all defendants]?

To this question counsel for defendants objected to the defendants making answer, or to making answer to any other question arising under the allegations of the bill in respect to which they had already answered in their answers on file.

At the request of counsel the offer and objection were certified to the court for a ruling and the matter was heard by STOWE, P. J.

For defendants, *George Shiras, Jr., Esq.*, urged that under the Act of 27th March, 1865, P. L., 38, the defendants were not competent witnesses, and that said act was not affected by the Act 15th April, 1869, P. L., 30, citing *Ash v. Guie*, 28 PITTSBURGH LEGAL JOURNAL, 449.

Thos. M. Marshall, Esq., also for defendants.

The twelfth paragraph of the bill substantially charges an indictable offense and the witnesses cannot be compelled to answer.

The bill is substantially for a discovery, and is therefore within the Act of 27th March, 1865, *supra*.

For plaintiffs, *J. M. Thompson, Esq.*, (with him *A. M. Woodward* and *O. D. Thompson, Esqrs.*).

The bill is not for a discovery, and the defendants are under the act clearly competent, it providing that "any party in any civil action * * * at law or in equity may compel any adverse party * * * to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses."

The objection to answering on the ground that it may criminate the witness, must come from him, and cannot be made by counsel.

C. A. V.

Opinion by STOWE, P. J. Delivered February 15, 1882.

To E. Y. Breck, Esq., Master in Chancery:

Originally the rule in regard to the competency of witnesses was the same, with some special exception, in equity as at law. Persons having interest in the result of the proceeding were disqualified and generally also all parties to the suit. Plaintiffs in equity, however, could compel the defendants to testify in response to

their bill under certain legal restraints, and defendants by cross-bills (now under our equity rules by cross-interrogatories) could search the conscience of the plaintiffs. But this having been done, neither party could compel the other to testify before the examiner or master or the court. This being the case, the Act of 27th March, 1865, P. L., 38, was passed as follows:

"Any party in any civil action or proceeding, whether at law or in equity, may compel any adverse party, or any person for whom immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses, *provided, however*, that no party shall be allowed to compel an answer to a bill of discovery from an adverse party and also compel him to testify."

The second Section of the Act of 15th April, 1869, P. L., 30, regulates the manner of examination and provides that a party calling his adversary shall not be concluded by his evidence.

The first question is in regard to the special cases where the plaintiffs cannot compel an answer and also examine the defendant as a witness. The proviso in terms limits them to bills of discovery, and it is suggested that because this bill requires an answer and compels defendants to reply to its allegations, discovery is required upon such matters, and therefore the defendant cannot be compelled to testify. The very fact that such a construction of the act would, in all cases where an answer is required, prevent the calling of defendant as a witness, would be a sufficient reply to this, but the words of the act are clear and limit to restriction to bills of discovery alone—a distinct and well recognized class of bills in equity, the sole purpose of which is the discovery of facts to base some other proceedings upon in law or equity.

It is, however, urged that this bill alleges a conspiracy, such, as if true, would be indictable, and therefore defendants cannot be compelled to answer. The question cannot be raised here. The objection does not come from the witness but from the counsel. Parties when called are subject to the same rules as other witnesses, and the law is well settled that the objection must come from the witness, *qua* witness, and not from any other parties. He may answer if he chooses; the privilege is his own and counsel will not be allowed to make any objection (Greenleaf on Ev., Vol. I, Sec. 451, and cases cited); and the witness, while not required to state how he might be criminated by the answer, should at least state, under oath, that the question, if answered, would tend to criminate him.

In this case the witnesses have, so far as we know, no disposition to refuse to answer fully

everything they know. In fact it is said, in open court, that they are entirely willing to tell everything they may know in the premises, and I have not the least doubt such is the fact.

But as I am unhesitatingly of the opinion that there is nothing in the law which exempts defendants from the act, giving plaintiff a right to call and examine adverse parties as witnesses, they must answer all proper questions put to them touching the questions in issue between plaintiffs and defendants. If, however, any defendant, who may be called as a witness, should refuse to answer, claiming a right to do so upon the ground, *stated by him under oath*, that he believes the answer would tend to criminate him, he should not be required to do so, but be allowed his exemption.

JOHN R. HARBISON, Assignee of STEWART
v. REED et al.

Procuring title at sheriff's sale by fraud—Deterring parties from bidding at such sales—Limitation of action of ejectment after discovery of fraud.

Charge by COLLIER, J.

This is an action of ejectment to try the title to two tracts of land, situate in Findley township, in this county.

Both the plaintiff, Mr. Stewart, and the defendant, Mr. Reed, claim through Henry Weaver, who, it is admitted, was the owner at one time of the two tracts.

The plaintiff, Mr. Stewart, has given in evidence to you, to sustain his claim of title, a sheriff's sale and deed to him of the lands in dispute, acknowledged on December 30, 1871, on a judgment, the lien of which was prior to the lien of the judgment of Mr. Reed, the defendant.

The proceedings being regular on their face, the plaintiff is entitled to your verdict unless the defendant has shown you by his evidence that the sheriff's sale, by which the plaintiff acquired title, was not valid.

The defendant, Mr. Reed, alleges that he has by his evidence shown you Mr. Stewart's title is invalid and void. He alleges that Mr. Stewart was the actual purchaser at the sheriff's sale or previously to the sheriff's sale, had made an arrangement with Mr. McClurkan, the holder of the mortgage upon which the property was sold, by which Mr. Stewart was to be the real purchaser; and that by unlawful combinations, bargains, tricks and devices, he prevented purchasers who intended to bid, from bidding, and that by such unlawful bargains, tricks and de-

vices, the property was knocked down for less than its fair value, and below what it would otherwise have sold for.

If you find this theory of the defendant sustained by the weight of the evidence, then defendant having a sheriff's deed of the premises, dated July 6, 1878, is entitled to have a verdict in his favor, if you find that he brought his action of ejectment, within five years from the date of the fraud, or from the time which by reasonable diligence, he might have obtained knowledge of it.

The Supreme Court in 1st Casey, page 416, on this subject, uses this language, viz: "A purchaser at sheriff's sale, who practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an undervalue, thereby renders the title void and worthless in his hands. But it must be shown, also, that he did get it for less than it was worth or less than it would have sold for at a fair sale. A mere naked intention to fraudulently get land for less than it was worth, or an unsuccessful effort which results in no loss to one party or gain to the other, is not enough to make the title of the purchaser void."

You will observe, gentlemen, that the law, as just announced, requires:

First.—The plaintiff must be a *purchaser* at the sheriff's sale.

Second.—That he resorted to imposture, trick or device to get the property at an undervalue, and

Third.—That he did thereby get it at an undervalue.

All these three propositions must be made out by the defendant, no one or two will answer, and the burden is on the defendant.

Then, gentlemen, as to the first proposition, was Mr. Stewart the real purchaser at the sheriff's sale? Was he the actual bidder, or was there an arrangement between him and Mr. McClurkan that the property should be knocked down to McClurkan, and that Stewart should have it as the purchaser?

On the part of the defendant, Mr. Reed, you have the sheriff's deed to Mr. Stewart and the special return of the sheriff, together with other evidence, tending to show that Mr. Stewart was the real purchaser at the sheriff's sale.

On the part of the plaintiff, Mr. Stewart, you have the testimony of ex-Sheriff Fleming, ex-Deputy Diehl, Mr. Purviance and the plaintiff himself, tending to show that Mr. McClurkan was the purchaser for himself and not for Mr. Stewart. If you believe that the lands were knocked down to McClurkan, and that he bought for himself and afterwards sold the

lands to Mr. Stewart, and in pursuance thereof directed the sheriff's deed to be made to Stewart, then you should find for the plaintiff; there being no evidence that Mr. McClurkan was guilty of any fraud. The Supreme Court has so decided in this very case.

But if you should find that Mr. Stewart was the real purchaser at the sheriff's sale, either by being the actual bidder or by a previous arrangement before the sale with McClurkan, then you may pass to the consideration of the second proposition, viz: Did Stewart, the plaintiff, resort to imposture, tricks or devices to get the property at sheriff's sale at an undervalue?

The testimony upon this point is somewhat voluminous and I shall not go over it. Did the plaintiff Stewart make false representations? Did he resort to any device or devices to deter persons from bidding at the sheriff's sale, with the design and object of getting the property at an undervalue? Remember, gentlemen, your inquiry must be directed to the sheriff's sale. If he did not, then your verdict should be for the plaintiff. If he did, then in the third place, did the plaintiff, Mr. Stewart, thereby get the property at an undervalue?

Was any person or persons, who would have bid at the sheriff's sale, deterred from bidding, by these misrepresentations or devices, thereby enabling the plaintiff to get the lands at an undervalue, or did the plaintiff pay the fair value of the lands at that time?

If no person was deterred from bidding, and the plaintiff was not enabled thereby to get the property at an undervalue, but on the contrary paid the fair value thereof, then your verdict should be for the plaintiff. But if you should find that the plaintiff, Mr. Stewart, did by reason of the misrepresentations, get the property below its fair value, and you find in favor of the defendant on the two preceding propositions, and that he has brought his suit against the plaintiff, within five years from the date of the fraud, or from the discovery thereof, or when by reasonable diligence he might have discovered the same, then your verdict should be for the defendant.

(Points of plaintiff and defendant read and answered).

And now, gentlemen, in conclusion, the plaintiff is entitled to your verdict, unless the defendant has satisfied by the weight of evidence.

First.—That Stewart was the actual bidder or purchaser at the sheriff's sale, or which amounts to the same thing, that he had an agreement before the sale with McClurkan that it should be knocked down to him for Stewart.

Second.—That the plaintiff, Stewart, made

false representations, or resorted to imposture, tricks or devices to get the property at the sheriff's sale at an under value.

Third.—That in consequence and by reason of such misrepresentations, imposture and devices, he did get the property at an under value, and

Fourth.—That the defendant, Mr. Reed, has brought his action of ejectment against the plaintiff, within five years from the discovery of the fraud, or when by reasonable diligence he might have discovered the same.

If you find all these four points in favor of the defendant, then he is entitled to your verdict, otherwise the plaintiff.

In considering the case, gentlemen, the recovery of the defendant in the former ejectment is not conclusive, or there would be no use of another trial, but the law permits it to be given to you as persuasive evidence, and as such it is submitted to your consideration.

You will now retire to your room, gentlemen, and deliberate upon your verdict, examine the evidence with care, without passion, prejudice or haste; and under the instructions I have given you as to the law, find such verdict as the evidence and the law may conscientiously lead you to.

For plaintiffs, *Mcsmrs. Thos. M. Marshall and C. S. Fetterman.*

Contra, Mcsmrs. A. M. Brown and John Barton.

Court of Quarter Sessions, Allegheny County.

In Re Appeal of FRANK WOODS.

A city ordinance "to suppress disorderly houses, houses of ill-fame and disorderly assemblages," is not unconstitutional. It is a "police regulation" within the power of councils to make.

Visitors or inmates of disorderly houses and houses of ill-fame may be arrested without a warrant.

Error to the Court of Quarter Sessions of Allegheny county.

This was an appeal by Frank Woods from a summary conviction by the mayor of Pittsburgh. He was arrested in a house raided by the police, convicted and sentenced twenty days to the work-house of Allegheny county, under an ordinance which provides as follows:

"An Ordinance to Suppress Disorderly Houses, Houses of Ill-fame and Disorderly Assemblages.

SEC. "1. Be it ordained and enacted, by the City of Pittsburgh, in Select and Common Councils assembled, and it is hereby ordained and enacted by the authority of the same, That all houses of ill-fame, all houses frequented by persons for lewd and unchaste purposes, all unlicensed public dance houses, and all houses and places where intoxicating liquors are sold without license or

contrary to the laws of this Commonwealth, shall be deemed and held to be Disorderly Houses; and the police of said City are empowered to arrest every keeper thereof, and every person found therein, and to bring all such persons before the Mayor of said City for examination and hearing; and each such above described person, whom the Mayor shall adjudge guilty of maintaining such houses, or of visiting the same for improper purposes, shall be fined not less than five dollars, nor more than one hundred dollars, for each offense, and, in default of payment of such fine and costs, shall be committed to the Common Jail of Allegheny County for a period of not more than sixty days."

The appeal was heard by COLLIER, J., who held that the proceedings before him, under the Act 17th April, 1876, P. L., 29, allowing appeals to the Court of Quarter Sessions from summary conviction by magistrates must be *de novo*.

The appellant offered evidence to show that he was employed as a piano player in a room over a saloon from which liquors were supplied; that the room in which he played, as well as the upper part of the house, was occupied by a woman who had several women boarders; that the house was frequented by men who ordered liquors sent up from the saloon and drank them with the women inmates, but for what other purpose they visited the house the appellant was unable to say. He testified that he received \$5 a week and board for his services.

For the Commonwealth, evidence was offered tending to show that the house was one of ill-fame, and the purpose of having a piano player was to lure men into it.

For appellant, *W. C. Stillwagon, Esq.*

1. The ordinance is unconstitutional.
2. The arrest of the appellant on a warrant in which he was not named was illegal.

Contra, Gen. A. L. Pearson.

1. The ordinance is a police regulation and is constitutional.
2. The appellant can be held under the clause of the ordinance providing for the arrest and conviction of persons "guilty of maintaining such houses," *i. e.* disorderly houses or houses of ill-fame.
3. A warrant containing the name of each inmate of such house is not necessary. They are liable to arrest as "on view."

Oral opinion by COLLIER, J.

The ordinance is a "police regulation" and is, I think, constitutional. The officers have a right to arrest the inmates of a house coming within the terms of the ordinance without warrants naming those arrested.

The evidence warrants a finding that the appellant was assisting in maintaining a house of ill-fame and therefore was properly convicted under that clause of the ordinance.

Prisoner remanded.

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PITTSBURGH, PA., MARCH 8, 1882.

Supreme Court, Penn'a.

WOODS and McBROOM v. The PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY CO.

Contractors having a claim against a railroad company which, by the Act of January 21, 1843, P. L., 467, is paramount to the lien of a subsequent mortgage, and who are made parties defendant to a bill of foreclosure of said mortgage, are bound by a decree entered against them *pro confesso* in said foreclosure proceedings, by virtue of which the road and franchises of the company are ordered to be sold discharged of all liens, and cannot, therefore, long subsequently assert their claim as against the purchaser at said sale.

A prayer in the said bill of foreclosure, praying that the mortgage be decreed a first lien on the road and franchises, coupled with the joinder of the said contractors as defendants, and an allegation that they set up claims against the road, which complainant does not admit to be of any validity as against his mortgage, constitutes sufficient ground for such a decree as has been mentioned above, whereby the contractor's claim is concluded.

GORDON, J., dissents.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

Scire facias sur decree in equity, by John McBroom and Hugh Woods against the Pittsburgh and Steubenville Railroad Co. and the Pittsburgh, Cincinnati and St. Louis Railway Co., terre-tenants, brought by virtue of the Act of April 4, 1862, § 1, P. L., 235.

On the trial, before KIRKPATRICK, J., the following facts appeared: In 1855, John McBroom and Hugh Woods entered into a contract to perform certain work on the line of the Pittsburgh and Steubenville Railroad Co. They performed the work, and on August 14, 1856, at a meeting of the directors of the company a resolution was passed, assuming and promising to pay to McBroom and Woods, as compensation for their labor, the sum of \$6,650. The amount never was paid.

On August 1, 1856, the railroad company executed a mortgage of its road and franchises to Thomas McElrath, as trustee, for \$1,000,000, in order to secure the holders of bonds of the company the same day issued to that amount. The mortgage was recorded October 20, 1856. It was executed in contravention of the Act or Resolution of the General Assembly of January 21, 1843, P. L., 387, which provides that:

"It shall not be lawful for any company incorporated by the laws of this Commonwealth and empowered to construct, make and manage any railroad, * * * while the debts and liabilities * * * incurred by the said company to contractors, laborers or workmen employed in the construction or repair of said improvement remain unpaid, to execute a * * * mortgage or other transfer of the real or personal estate of the company, so as to defeat, postpone, endanger or delay their said creditors, without the written assent of the said creditors first had and obtained; and any such * * * mortgage or transfer shall be deemed fraudulent, null and void as against any such contractors, laborers and workmen, creditors as aforesaid."

On July 14, 1857, McBroom and Woods filed a bill in equity against the Pittsburgh and Steubenville Railroad Co., averring the contract entered into by them with said corporation. The company defendant did not appear, the bill was taken *pro confesso*, and a decree entered January 5, 1858, in accordance with the prayers of the bill, fixing the amount due the complainants, at \$10,689.43, and decreeing that defendant pay the said sum.

In 1865 Thomas McElrath, as trustee for the various bondholders, filed a bill in equity in the Supreme Court against the Pittsburgh and Steubenville Railroad Co. *et al.* to foreclose the mortgage held by him. To this bill McBroom and Woods were made defendants, it being averred that they "allege themselves to have been contractors with the Pittsburgh and Steubenville Railroad Co. for the construction of certain work, and that in pursuance of said contract they did some work towards the construction of said railroad, and claim some lien or interest thereon, of the nature of which the complainant is not advised, but which he does not admit to be valid, or that the same can in anywise affect the priority of lien of the said mortgage or the rights of any of the holders of the bonds secured thereby."

The bill prayed that the mortgage of August 1, 1856, be decreed and declared a first lien on the premises; that the amount due the various bondholders secured thereby be ascertained; that the company defendant be decreed to pay said sum within a time certain; and that in default of such payment "it be decreed that the defendants, and all persons claiming under them, be absolutely barred and foreclosed of and from all right and equity of redemption of, in and to the said premises, or that a decree be entered directing the sale of the whole of said premises * * * at such time and in such manner as the court may direct." McBroom and Woods were served with a subpoena, and entered an appearance, but upon being afterwards ruled to plead, answer or demur, failed to comply. A decree *pro confesso* was entered against them. The case was heard on bill, answer and

proofs, and on the master's report, and on May 29, 1867, a decree was finally entered, that the mortgage of August 1, 1865, was a first lien on the premises, being the amount due the various bondholders, ordering that the same be paid within ninety days, and in default thereof directing the sale of the mortgaged premises, and authorizing and empowering McElrath to execute a deed therefor to the purchaser in fee simple, "and that the said purchaser * * * should thereupon hold the same free and discharged of all liens or incumbrances whatever, and from any claims of the Pittsburgh and Steubenville Railroad Co. thereon or thereto." See *McElrath v. Pittsburgh and Steubenville Railroad Co.*, 5 P. F. Smith, 192. Default having been made in paying the amount ascertained to be due by the decree, the premises were sold, and were bought by the Pittsburgh, Cincinnati and St. Louis Railway Co., to which corporation McElrath executed a deed in fee simple.

On February 2, 1878, McBroom and Woods issued the writ of *scire facias* in this case on the decree of January 5, 1858, to which the Pittsburgh, Cincinnati and St. Louis Railway Co. took defense. The writ was issued in accordance with the provisions of the Act of April 4, 1862, § 1, P. L., 235, which provides as follows:

"Whereas, it frequently happens that incorporated companies, by assignment, conveyance, mortgage or other transfer, divest themselves of their real and personal estate, in contravention of the provisions of the resolution of January 21st, 1843; therefore, *Be it enacted*, That, whenever, any incorporated company, subject to the provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of the said resolution, it shall and may be lawful for any contractor, laborer or workman employed in the construction or repair of the improvements of said company, having obtained judgment against the said company, to issue a *scire facias* upon said judgment, with notice to any person, or to any incorporated company, claiming to hold or own said real or personal estate, * * * the case to proceed as in other cases of *scire facias* on judgments against terre-tenants."

Under the instructions of the court the jury found for the plaintiffs in the sum of \$24,849.92, subject to the question of law, which was reserved, whether plaintiffs were not estopped and concluded from recovery by the proceedings and decree in the case of *McElrath v. Pittsburgh and Steubenville Railroad Co. et al.*, 5 P. F. S., 192.

Subsequently the court entered judgment for the defendant *non obstante veredicto* on the point reserved, whereupon plaintiffs took this writ, assigning for error the entry of judgment *non obstante veredicto*.

For plaintiffs in error, *Messrs. T. C. Lazear, S. A. McCung and John G. McConnell*.

Contra, *Messrs. Hampton & Dalzell*.

Opinion by SHARSWOOD, C. J. Filed January 2, 1882.

It is not to be questioned that the claim of the

plaintiff, a contractor of the Pittsburgh and Steubenville Railroad Co., under the resolution of the General Assembly of January 21, 1843, P. L., 367, was paramount to the mortgage of McElrath, under proceedings upon which the road was sold and the defendants claim title. The amount of their claim was ascertained by the decree of 5th January 1858, at least *prima facie* though not conclusively, as to McElrath, the mortgagee, who was not a party to it, though his mortgage was then in existence. It is clear, also, that if it had been paid in whole or in part when the decree of foreclosure and sale under the McElrath mortgage was made, the mortgagee and purchaser were entitled to the benefit of such payment.

It may be, also, that under the resolution no mere acquiescence or other acts *in pais* can operate as an estoppel. Nothing can avail but the written assent of the creditors to the mortgage first had and obtained: *Shamokin Valley and Pottsville Railroad Co. v. Malone*, 4 Norris, 25. But it certainly cannot be maintained that there may not be an estoppel by matter of record. An adjudication at law or in equity against the claim of the contractor, must be as conclusive against him as against any other claimant.

What, then, was the effect of the proceeding in this court upon the McElrath mortgage and the decree of sale thereunder? If the plaintiffs had not been made parties, their rights would have been entirely unaffected. But they were parties. The bill charged that "they (Woods and McBroom) claimed to have a lien on the premises described in the mortgage; that they allege themselves to have been contractors with the said Pittsburgh and Steubenville Railroad Co., for the construction of said work, and that in pursuance of said contract they did some work toward the construction of said railroad, and claim to have some lien or interest therein, of the nature of which the complainants are not advised, but which they do not admit to be valid, or that the same can in anywise affect the priority of lien of the said first mortgage, or the rights of any of the holders of the bonds thereby secured." The plaintiffs were then distinctly called upon to come in and make known their claim, not as a lien merely on the fund to be produced by the sale, but some interest in the railroad. They were stated to be contractors for the building of the road, the holders therefore of a privileged claim—under the resolution of 1843 something more than a lien—an interest in the road which could not be divested by a sale. The inference from all this was too plain to be mistaken. It was not as mere holders of a lien which could come upon the fund, but as hav-

ing an interest paramount to the mortgage, that they were summoned to appear and answer. The principal contention of the plaintiffs here has been that there was no prayer in the bill that the road should be sold clear of all incumbrances. If, then, contractors had come in and established their claim, no such decree could have been made. The sale would have been necessarily subject to their claim. It might well be that the sale would not produce sufficient to pay them. The purchasers must then take *cum onere*. But no such contractors making defense, though summoned and appearing, the decree of sale could then properly be made, as it was, clear of all incumbrances. If all that the bill sought was to ascertain who were lien holders to be paid from the proceeds, they were unnecessary parties. This they knew very well; they knew, or ought to have known, that they were made parties as having an interest in the road paramount to the mortgage. It is perfectly clear that the object, and sole object, in making them parties was to ascertain what claims the road would be subject to in the hands of the purchasers, so that bidders might know for what they were bidding. They appeared to the bill; they had the opportunity to prove their claim conclusively as against purchasers. They did not avail themselves of it. When ruled to plead, answer or demur, they suffered the bill to be taken *pro confesso* against them. What did this mean? Surely that they had no such interest in the road as contractors as would be set up against the mortgage. They chose to adopt this course, and they must take the consequences. Generally under a bill to foreclose a second mortgage, the first mortgagee is not a necessary but he is a proper party, especially whenever a sale is prayed for, as it is certainly desirable that the property should bring a full and fair price, which cannot be if there is any uncertainty as to what title the purchaser will take, free or encumbered. Story Eq. Pl., Sec. 193; *Jerome v. McCarter*, 4 Otto, 734. These plaintiffs, after suffering the bill to be taken *pro confesso* for some reason best known to themselves, chose to go to sleep for eleven years, and then, when all the papers and vouchers of this long dead and buried corporation are probably destroyed or lost, the witnesses dead or scattered to the four winds, so that payment of the claim before the decree could not be proved, they suddenly wake up and ask that the road, in the hands of the purchaser, should be made liable. It is a very stale claim, not to be favored, and ought not to succeed.

Judgment affirmed.

GORDON, J., dissents.

**AZARIAH STEPHENS et al., Administrators,
Plaintiffs Below, v. JOHN COTTERELL.**

In an action by an administrator to recover a debt for goods of the intestate, which he, as administrator sold, the vendee cannot set-off a debt due from the intestate to him. After the goods have been reduced to the administrator's possession, and sold, he may sue for such a debt in his own right, it being the enforcement of a contract made with him.

Where the goods come into the hands of the administrator after the death of the decedent, no sale having been made by him in his lifetime, nothing less than clear and specific evidence that the exclusive right of property was not in the decedent at the time of his death, should be permitted to divert the proceeds from distribution among all the creditors.

An offer to prove facts existing and acts occurring, in relation to a decedent's estate, after his death, should not be rejected, because the evidence may, in its effect, tend to prove that the same facts existed prior to his death.

The mere fact that a wife is called to testify against the interest of the estate of her deceased husband, does not make her incompetent. She is competent to testify to facts which come to her knowledge, otherwise than through the confidential relations existing between her and her husband.

Error to the Court of Common Pleas of Greene county.

This was an action on the case brought by the administrators of Israel Stephens to recover from John Cottrell the price bid for certain personal property of the decedent at the administrator's sale. The facts, briefly, were as follows: Israel Stephens died in July, 1874, having a farm in Whitely township, on which the property in question, consisting of horses and cattle, remained up to the time of the sale in August, 1874. The defendant bid them in for \$408, and refused to pay on the ground that the decedent owed him on a note of \$500, and that he had, during his lifetime, directed his brothers, the administrators, to take possession of the property, make sale and pay the defendant his note; that they did take possession in the lifetime of the decedent, and that the defendant bought the property under an arrangement with them that the proceeds were to be applied to the note. The plaintiff's deny that the property came to their possession in the lifetime of the decedent, or that they ever agreed to take possession for the purposes alleged by the defendant, or that there was any such arrangement, as claimed, that the price was to be applied to the note, alleging further, that as the estate of the decedent was insolvent, it was not in their power to make any such arrangement. At the trial the defendant offered the note in evidence, and also the testimony of Mrs. Stephens, to which the plaintiffs objected as irrelevant and incompetent, but the objections were overruled by the court. Verdict and judgment thereon for the

defendant. The plaintiffs then took this writ, assigning for error the admission of the above evidence; the rejection of this evidence that they had no control over the property until after the granting of letters of administration, and the instructions of the court, that, if there was such an agreement as claimed between the decedent, his administrators and the defendant; then the plaintiffs could not recover.

For plaintiffs in error and below, *A. A. Purman, Esq.*

Contra Messrs. Wiley, Buchanan and Watson.

Opinion by MERCUR, J. Filed January 3, 1882.

This suit was to recover the sum bid by the defendant on his purchase of personal property at a sale made by the plaintiffs as administrators of Israel Stephens. The defendant held a note against the decedent, and claims to have paid his bid by indorsing the amount thereof on the note.

It is settled law that in an action by an administrator to recover a debt for goods of the intestate, which he as administrator sold to the defendant, the latter cannot set-off a debt due from the intestate to him. After the administrator has reduced the goods to his possession and sold them, he may sue for such debt in his own right. It is for the enforcement of a contract made with him. Naming himself as administrator is surplussage: *Wolfersberger et al. v. Bucher*, 10 S. & R., 10; *Beale et al. v. Coon*, 2 Watts, 183; *Steel v. Steel*, 2 Jones, 64.

To avoid the application of this rule of law and to strengthen his position, the defendant gave evidence that there was an agreement between him and Israel Stephens by which the property, afterwards bought by him, should be put into the possession of Barzilla Stephens and Azariah Stephens with instructions to sell it and apply the proceeds thereof on said note; that in pursuance of the agreement the property was put into their possession and so continued; that it remained unsold until after letters of administration on the estate of Israel issued to them; that he purchased at the administrators' sale with the belief that he was buying under the agreement made with Israel, and that after his purchase the administrators consented that the sum bid be indorsed on the note. The plaintiffs strenuously denied having taken any possession of the property in the life of Israel or that they consented to an indorsement on the note of the sum bid.

The facts are unquestioned that the estate of Israel Stephens is insolvent, and that the property in question was duly inventoried and ap-

praised as the property of the estate after the plaintiffs were appointed administrators thereof.

In the rejected evidence covered by the third assignment there was an offer to prove by Barzilla Stephens, one of the plaintiffs, substantially, that he first took possession of the property on or about the time of the appraisement, and also where the property was found after letters of administration were granted to the plaintiffs. The defendant objected thereto, first, as it tended to prove a fact prior to the death of Israel, and, second, that where they found it when they took possession after his death was irrelevant. The objections were sustained. In this we think there was error. It is not concealed that one purpose of this evidence was to create a presumption that the present plaintiffs had not taken possession of the property before the death of Israel. Nevertheless the offer was to prove facts existing and acts occurring after his death. Although the evidence may, in its effect, tend to prove the same fact existed prior to his death, that is no cause for its exclusion: *Rothrock v. Gallaher*, 10 Norris, 108. It was entirely competent to prove, as bearing on both positions contended for by the defendant, where the property was found and in whose possession, at the time the administrators, as such, took possession thereof.

As no sale of the property was made during the life of Israel, and it was inventoried, appraised and sold after his death, as the property of his estate, nothing less than clear and specific evidence should be permitted to divert the money for which it sold from a distribution among all the creditors. Having been sold as the property of the estate, it is the interest or property of the estate only, which is presumed to have passed by the sale, and for this alone the defendant bid. There is no evidence of any notice given at the sale that the exclusive and unquestioned right of property was not in Israel at the time of his death. The plaintiffs, as administrators, held all the personal estate of the decedent in trust for his creditors. Acting as such, they sold the property. They had no power to prefer a creditor whom the law did not prefer. They could not by agreement change the due course of distribution to the prejudice of any of the creditors. It was held, in *Fritz v. Thomas*, 1 Wh., 66, that an administrator, sued in his representative character for a debt due by the decedent, may plead the statute of limitations as a bar to the action, although such administrator may have made such an acknowledgment of the debt, as in the case of a person sued for his own debt, would be sufficient to take the case out of the statute. The admin-

istrator cannot be compelled to adhere to an agreement made by him with one creditor in fraud of other creditors: *Steel v. Steel, supra*.

In affirming the point covered by the seventh assignment undue weight was given to the belief of the defendant, if when he bought at the vendue "he believed from what he had heard from the administrators that he was purchasing in pursuance of said agreement" made with Israel. Whether the administrators or any other person so believed or understood at the time of the sale is wholly ignored in the point; nor is any fact stated therein, showing why he then believed it, other than that the property was unsold at the time of Israel's death.

The mere fact that Mrs. Stephens was called to testify against the interest of the estate of her deceased husband, did not make her incompetent. She is competent to testify to facts which came to her knowledge otherwise than through the confidential relations existing between her and her husband. Such were the facts here and she was therefore competent. We discover no error in the second and fourth specifications. In so far as the others are in conflict with this opinion they are sustained.

Judgment reversed and venire facias de novo awarded.

HOWARD McCafferty, Adm'r of WILLIAM McCafferty, v. ORR GRISWOLD, H. B. GRISWOLD and RUSH GRISWOLD.

A written lease of five acres of land, out of a tract of ten acres, for twenty years was made for the purpose of sinking a well and conducting operations in oil, and at the same time the lessor made a verbal promise to the lessees that if the operations were successful he would execute a lease for the five remaining acres.

Held, in an action brought by the lessors, that the promise was for a lease of more than three years, and, under the Statute of Frauds, could not be sustained.

In an action for the breach of a parol agreement, the measure of damages is not the value of the bargain; i. e., the difference between the price to be paid and the actual value of the lease or other subject of contract; but the proper measure of damages is the money paid and the expenses incurred on the faith of the contract, and if no money has been paid or expenses incurred the damages are nominal.

Jack v. McKee, 9 Barr, 235, criticized; *Hertzog v. Hertzog*, 10 Casey, 418, and *Thompson v. Shepler*, 22 P. F. S., 160, approved.

Error to the Court of Common Pleas of Mercer county. The facts of the case are sufficiently stated in the opinion of the court.

Opinion by GORDON, J. Filed January 2, 1882.

This was an action on the case brought by the Griswolds, the plaintiffs below, against the administrator of William McCafferty's estate, to

recover damages for the breach of a parol agreement, or rather promise by William McCafferty in his lifetime, to execute to the plaintiffs a twenty years' lease for five acres of land in the county of Butler. On the 31st of August, 1872, McCafferty made a written lease to the plaintiffs for five acres of land, for the term of twenty years, in consideration of which the plaintiffs agreed to enter upon the land immediately and bore for oil, and, if they were successful, render to McCafferty one-sixth of the oil which might be produced. They were also to pay him one hundred dollars an acre for the land if for ten successive days the well yielded twenty-five barrels of oil a day, and two hundred dollars an acre if the yield was forty barrels or over. The plaintiffs entered upon the property and diligently prosecuted their work at a cost of ten thousand dollars, and at a depth of fourteen hundred feet they found oil in quantity sufficient to produce one hundred and seventy barrels a day. Afterwards they sold this lease for the sum of eighteen thousand dollars. Now, according to the testimony of the plaintiffs, McCafferty had previously to the time of the execution of the lease above mentioned, promised orally that it should cover ten acres. It was further proved, that these plaintiffs refused to execute this paper or to proceed with the work except on the promise then made by McCafferty that he would afterwards lease to them the additional five acres.

This, then, is a brief outline of the facts as found by the jury, and which, though denied by the defendants, we must take as true. For a breach of this promise to lease, this action is brought. The court instructed the jury that if they found the facts as above stated, the plaintiffs were entitled to recover, and that they might adopt, as a proper measure of damages, half of the cost of the well put down on the five acre lease. The defendant complains of this instruction as improper and illegal, and we think his complaint must be sustained. The case is one covered by the statute of frauds and perjuries. The promise was for a lease of more than three years, and, hence, under the statute, it cannot be sustained. Nevertheless, an action for the breach of this parol agreement was well brought; but what should be the measure of damage? Not the difference between the price to be paid and the actual value of the lease, in other words, the value of the bargain. For since the case of *Hertzog v. Hertzog*, 10 Ca., 418, which overruled *Jack v. McKee*, 9 Barr, 235, and the cases which followed it, no such rule can be applied. On the other hand, we have in *Thompson v. Shepler*, 22 P. F. S., 160, and *Sau-*

ser v. Steinmetz, 8 W. N. C., 100, this rule stated as the proper measure of damages for the breach of parol leases and sales of lands; that is to say, the money paid and the expenses incurred on the faith of the contract; but if no money has been paid or expenses incurred, the damages are nominal.

In the case in hand there was no money paid, neither was there any expense incurred on account of the land proposed to be leased. But it is urged that without this promise the plaintiffs would not have put down the well upon the five acre lease. Let this be admitted; what then? They would have lost, according to their own showing, a bargain of eight thousand dollars. What kind of damages are these; they put down a well at a cost of ten thousand dollars for which they got eighteen thousand? What nonsense to talk about damages for the breach of an oral contract which led to such a result as this. But let us suppose the well to have been put down on the faith of a parol lease, and the result had as above stated, on a breach of the contract by entry of the landlord and ouster of the tenants, what would be the damages recoverable by the lessees? Nothing save the expenses they had incurred in the prosecution of the work, but as these are paid and overpaid from the land itself they can get nothing more, for they have suffered no loss. There seems, indeed, to be a constant disposition on part of courts to revert to the exploded doctrine of *Jack v. McKee*, to impinge upon the statute in giving to the plaintiff some compensation for the loss of a good bargain. But this must not be allowed. Injury enough has resulted from that doctrine to demonstrate the wisdom of a strict adherence to the statute, and it is to be hoped that the ruling of *Jack v. McKee* will never again find a place in the jurisprudence of Pennsylvania. Manifestly, here is an attempt to get back upon the forbidden ground; an attempt to compensate the plaintiffs, at least in part, for the loss of a good bargain; otherwise, how could the court have permitted the plaintiffs to recover when they had suffered no loss? But we cannot thus permit the force and vitality of a valuable statute to be frittered away, and that upon equities and hardships which are purely factitious. The plaintiffs have suffered neither loss nor wrong. They not only made money by their contract, but, as to the parol agreement, they knew it was binding on neither party. Had their operation on the lease proved a failure, McCafferty certainly could not have compelled them to sink a well on the other lot, neither could he have recovered damages for their refusal so to do.

There being thus a total want of mutuality in the alleged contract, and the plaintiffs having suffered no pecuniary loss, they had no standing, either in law or equity, to recover any but nominal damages.

The judgment is reversed and a venire facias de novo is ordered.

For plaintiff in error, *Messrs. Wm. Maxwell and Griffith & Sons.*

Contra, Messrs. S. H. Miller and Q. A. Gordon.

CAULEY v. PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY.

In an action by a minor, seven years old, against a railroad company, to recover damages for an injury alleged to have been occasioned by the negligence of defendant's servants, plaintiff offered to prove that he being on a sand car standing on a switch within the city limits, the car was moved a few yards, and that while the car was in rapid motion the conductor ordered the boys off, in obeying which order the plaintiff was injured.

Held, that the plaintiff being a trespasser, the offer did not contain any evidence of negligence on the part of defendant, and that therefore the same was properly rejected.

An offer to prove a fact which can only exist by the suspension of natural laws should not be received.

TRUNKEY and STERRETT, JJ., dissent.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

Case, by John H. Cauley, a minor, by his father and next friend, John Cauley, against the Pittsburgh, Cincinnati and St. Louis Railway Company, to recover damages for an injury to plaintiff alleged to have been caused by the negligence of defendant's servants.

Plaintiff's father also brought an action against the company, defendant, to recover damages for loss of services, etc. Both cases resulted in judgments for defendant. Plaintiffs took one writ of error for both cases which was, however, quashed on the ground that a separate writ should have been taken to bring up each case. The full facts of the cases, the rulings of the court below, the assignments of error, the arguments of counsel, and the opinion of the Supreme Court, delivered by PAXSON, J., quashing the writ of error, but expressing the opinion of the court on the merits of the cases, are reported in 28 PITTSBURGH LEGAL JOURNAL, 111.

Plaintiff in this case thereupon took this writ, filing the same assignments of error as had before been filed by him.

For plaintiff in error, *A. M. Watson, Esq.*

Contra, Messrs. Hampton & Dalzell.

Opinion by PAXSON, J. Filed January 3, 1882.

This case has been twice argued. There were

two suits brought against the defendant company to recover damages for the injuries complained of, one by the father in his own right, the other, which is the present case, by the boy who was injured. They were argued together, and the writ in each case quashed for the reason that but one writ was issued to bring up the two cases. As they were fully argued we deemed it proper to express our opinion upon the merits. No fault was found with our view of the case in which the father sued in his own right. But as to the present case the learned counsel for the plaintiff was of opinion that we had not given due consideration to the distinction which exists between children and adults in the matter of contributory negligence. A second writ of error was accordingly sued out and was heard at the last term in the Western District.

A reconsideration of the case, aided by the second argument, has failed to satisfy us of any error in the former opinion.

The distinction referred to was not lost sight of. It is true that we did not discuss it then, nor do we propose to do so now, for the reason that conceding all that is claimed for it, no negligence was shown or offered to be shown on the part of the defendant company. All the conductor did was to order the plaintiff off the car. This it was his duty to do. The boys were trespassers, and their removal from the car was not in itself a cause of complaint. Was there anything in the manner of their removal which would render the defendant company liable in damages? The plaintiff was not thrown off the car. He was not touched by the conductor or any railroad employee. He was told to get off a sand car which was being shifted from a siding to a switch a few yards distant. Had the conductor any reasonable ground to believe when he told the boys to get off that any of them would be injured in doing so? Before the company can be held liable it must appear that the injury to the plaintiff was the natural and probable result of the conductor's order; such a consequence as he might and ought to have foreseen at the time: *Hoag v. Railroad Co.*, 4 Norris, 293. A sand car is a low flat from which an ordinary boy between seven and eight years of age can jump with perfect safety. If it was alleged and offered to be shown that the plaintiff was frightened at the order he received, it is difficult to perceive how such fact can impute negligence to the defendant. If the brakeman approached the boys in a manner indicating an intention of enforcing the conductor's orders, it only shows that they had refused to comply with his previous request. It was urged, however, and there was an offer to prove, that the

car was going at a rapid rate of speed when the plaintiff was told to get off; as a general rule when an offer of evidence is rejected we must assume the fact to be as stated in the offer. But in the present instance the plaintiff's own statement of his case shows this portion of the offer to have been a physical impossibility. The history of the case, which we have a right to assume to be correct, contains this statement. "On the 20th of September, 1879, John H. Cauley, the minor son of John Cauley, and plaintiff in this suit, about 9 o'clock A. M., in company with a number of small boys, but little older than himself, was playing on a car laden with sand upon a side-track of defendant's road, which car formed part of a train that the defendant's employees, under the direction of one of the freight conductors in charge, were shifting in order to run the same upon a switch a few yards distant. These boys had been playing upon this sand car, and after the train began to move towards the switch with increased speed, the conductor ordered them to get off the car." That this sand car in being shifted from a side-track to a switch but a few yards distant, could acquire a rapid rate of speed, is such a physical impossibility as to render the use of those words in the offer of no significance. An offer to prove an impossible thing must be received. But an offer to prove a fact which can only exist by the suspension of natural laws does not come within the rule.

From the best consideration we can give this case, we are of opinion the judgment must be affirmed.

TRUNKY and STERRETT, JJ., dissent.

MATTHEW SIMPSON et al., Executors, Plaintiffs Below, v. CAROLINE DeB. DUNCAN et al., Administratrix.

By power of attorney A., at various dates, drew from a bank \$10,000 belonging to B., the last item having been drawn March 3, 1869. B. thereafter went to Ireland, where he died testate. His will was offered for probate and contested by A., but unsuccessfully, the litigation ending on June 30, 1874. In 1872 letters of administration, *pendente lite*, were issued. Suit was brought on June 3, 1876, by the administrators against the administratrix of A. (who had died in the meantime), to recover the \$10,000. *Held*, that the Statute of Limitations barred the action.

Error to the Court of Common Pleas, No. 1, of Allegheny county. For statement of facts and opinion of the court below by STOWE, P. J., see 28 PITTSBURGH LEGAL JOURNAL, 7.

PER CURIAM. Filed November 21, 1881.

We affirm this judgment upon the opinion of the learned president of the court below.

Judgment affirmed.

Court of Common Pleas, No. 2.

MICHAEL MORAN v. THE CONNELLSVILLE COAL, COKE AND IRON COMPANY.

A writ of summons may be served on a corporation by serving it on the proper officers in any manner that the like writ may be served on a natural person. Jurisdiction in a transitory action against a private corporation is not confined to the courts of the county in which it has a place of business.

Rule to show cause why service of the writ of summons should not be set aside.

Opinion by EWING, P. J. Filed January 21, 1882.

The writ is an action on the case, and was made returnable to the first Monday of October. The sheriff returns the writ as served on October 3d, by leaving a true and attested copy of the writ at the residence of E. K. Hyndman, President of the Connellsville Coal, Coke and Iron Company, with an adult member of the family. On the 12th of December a declaration was filed, claiming damages for an alleged injury to plaintiff, caused by defendant's negligence at its coal works in Fayette county.

On the 31st of December, defendant, by its attorneys, entered the rule to set aside service of the writ, assigning no reason, but at the same time filing the affidavit of E. K. Hyndman, setting forth that the place of business of defendant—a domestic corporation—is in Fayette county, and that it has no office or place of business in Allegheny county, and that "he is not the president, nor is he a director or other officer or agent authorized to act for said company."

The reasons urged in support of the rule *arguendo*, are: (1) That E. K. Hyndman was not president of defendant company; (2) that the service must be made on the officer of the company in person, and that leaving a copy at his residence is insufficient; (3) that the defendant company can only be sued in this case in the county of Fayette.

No question is raised as to the form of the application. As to the first reason assigned, we are of the opinion that the return of the sheriff is not contradicted by the affidavit setting forth that at a time, nearly three months later, Mr. Hyndman was not the president of the company. It is not necessary, therefore, to pass upon the contention of plaintiff's counsel that the sheriff's return cannot be contradicted.

The forty-first Section of the Act of 13th June, 1836, P. L., 579, Pur. Dig., 286, is part of a general act relative to process. It provides that "Every corporation shall be amenable to answer upon a writ of summons * * * and service thereof shall be deemed sufficient if made upon

the president or other principal officer, etc., * * * in the manner hereinbefore provided."

When we inquire as to this "manner," we find it to be the provision for serving a natural person; that is, personally or by leaving a copy at the residence. Section 41 designates the officer on whom the summons may be served, and the previous section (second) designates the manner of service. The service in this case was made in one of the manners prescribed.

The third reason is based on the supposed ruling in *Brobet v. The Bank of Penn'a*, 5 W. & S., 379, cited in the foot-note in Purdon's Digest, as ruling that the summons must be served where the corporation is located. An examination of the case shows that no such question arose in the case. The controversy was as to the officer on whom the writ had been served.

The action in this case is transitory, not local. There is nothing in the Act of Assembly limiting jurisdiction over the defendant to the county of its location. This branch of the case is so well stated and decided in the able opinion of Judge THAYER, in the case of *The Lehigh Coal and Navigation Co. v. The Lehigh Boom Co.*, 6 W. N. C., 222, that we content ourselves with reference thereto.

The rule to set aside service of the summons is discharged.

For plaintiff, *L. P. Stone, Esq.*

Contra, Messrs. Knox & Reed.

NEW BOOKS.

THE AMERICAN DECISIONS, containing the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports, to the year 1869. Compiled and annotated by A. C. FREEMAN, Esq., Counselor-at-Law, and author of "Treatise on the Law of Judgments," "Co-Tenancy and Partition," "Executions in Civil Cases," etc. Vol. XXXI. San Francisco: A. L. BANCROFT & Co., Law Book Publishers, Booksellers and Stationers. 1881.

This volume contains cases from 14th Me. Rep., 1836-37; 9 Gill and Johnsons Md., 1837-38; 19th Pickering's Mass., 1837; 1st Howard's Miss.; 4th and 5th Mississippi, 1837; 9 and 9 New Hampshire, 1837; 1st Harrison's N. J., 1837; 3d Green's N. J. Chan., 1837; 6th and 7th Paige's N. Y. Chan., 1837; 17th and 18th Wendell's N. Y., 1837; 1st Devereux and Battle's N. C. Eq., 1837; 2d D. and B. N. C. Law, 1837; 8th Ohio, 1837; 6 Watt's Pa., 1837; 3d Wharton's Pa., 1837-38; Dudley's S. C. Law, 1837-38; Dudley's S. C. Eq., 1837-38; 10th Yerger's Tenn., 1837; 9th Vermont, 1837; Leigh's Va., 1836-37; 6th and 7th Porter's Ala., 1838; 1st Arkansas, 1837-38; 12th Conn., 1838; 2 Harington's Del., 1838. There are many valuable notes to the cases, among them a long one to the case of *Cuthbert vs. Kuhn*, 3 Wharton, 357, on the subject of rent, charge, apportionment of rent, etc.

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No. 31.

PITTSBURGH, PA., MARCH 15, 1882.

Supreme Court, Penn'a.

WESTERN PENNSYLVANIA RAILROAD COMPANY'S APPEAL.

A railroad company, authorized by its charter to construct a road from an incorporated city to another point, accepted an ordinance passed by the councils of said city, granting it a right of way up to a certain point therein. It then built its track up to that point, and established there its freight and passenger depots. There was no other act upon its part indicating an intention to fix the terminus at that point.

Held, that the power reposed in the company to locate and establish a terminus had not been exhausted, and that it might, with the consent of the city councils, subsequently extend its line to a point in said city beyond that where its depots were situate.

Independently of the question whether the company had fixed its terminus, the construction of the new track above referred to, was fully authorized by the Act of April 4, 1868, § 9, P. L., 62, enabling railroads to construct such branches from their main lines as they may deem necessary to increase their business and accommodate the public.

The construction of such new track by virtue of an ordinance of the city councils, whereby certain provisions were made as to its location and grade, was fully authorized by the Act of June 9, 1874, P. L., 282, enabling cities to contract with railroad companies for the re-locating, changing or elevating of tracks so as to secure the safety of life or property, and promote the interests of the municipality.

The land of a railroad company, consisting of a portion of a disused public canal purchased from the Commonwealth, upon which no tracks are actually laid by the owner, although they are shortly to be laid, is liable to be crossed by the tracks of another railroad company in such a manner as will not interfere with the use thereof by the owner for the construction of a railroad.

Appeal from a decree of the Court of Common Pleas, No. 2, of Allegheny county.

Bill in equity, between the Western Pennsylvania Railroad Company, complainant, and the Pittsburgh and Western Railroad Company, defendant, whereby the company complainant sought to enjoin the company defendant from laying its tracks over the company complainant's property. An answer being filed, the cause was referred to R. B. Carnahan, Esq., as Examiner and Master, who found the facts to be substantially as follows:

The company complainant is the owner of a certain disused part of the Pennsylvania Canal between Federal street and the Allegheny river,

in the city of Allegheny. Its title thereto is derived through divers mesne conveyances from a sale by the Commonwealth of the said canal bed. No tracks have hitherto been laid by the company complainant on said canal bed, but the bill averred that the time had come when it would be expedient and necessary for the company complainant to lay such tracks. The company defendant became by purchase in 1879 owner of the property and franchises of the Pittsburgh, New Castle and Lake Erie Railroad Company. This last-named company had been incorporated with power to construct a narrow-gauge road from Allegheny City to Wurttemberg, in Lawrence county. An ordinance was passed in 1877 by the Councils of Allegheny City, granting the last-named company a right of way as far west as the east line of Sandusky street. This ordinance the company accepted, and proceeded to build its road, which was marked as extending as far west as Sandusky street. The road was still incomplete at the time of the sale to the company defendant. The company defendant, immediately after its purchase, proceeded with the construction of the road as already marked out, and, purchasing a lot on the east side of Sandusky street, erected there its passenger and freight depots, which, on completion of the line, it began to use. There was no specific act of the Board of Directors shown fixing the western terminus of their road at the site of their depots.

In 1880 the Councils of the city of Allegheny passed an ordinance granting to the company defendant a right to lay its tracks along River avenue by the Allegheny river westward of Sandusky street to the western limits of the city. This ordinance the company defendant accepted, and thereupon proceeded to build its tracks along River avenue, proposing to continue them so as to cross complainant's canal property by a bridge twenty-one feet high. The company complainant sought to restrain the crossing of its property by the company defendant's tracks in the manner aforesaid.

The company complainant claimed that the company defendant had no right to construct its road westward from Sandusky street, because it had fixed upon the east side of that street as its terminus. The master was, however, of opinion that the mere act of the company defendant's predecessor in title in accepting the ordinance of 1877, and of the company defendant in constructing its line up to and its depots on the east side of Sandusky street, did not fix its terminus at that point. He was of opinion, moreover, that the track built by the company defendant westward of that point, in pursuance of the or-

dinance of 1880, was a branch of the main line of its road, and, as such, fully authorized by the Act of April 4, 1868, § 9, P. L., 62, and further that it was authorized by the Act of June 9, 1874, P. L., 282. He reported in addition that there was no reason why the company defendant should not construct its tracks over the property of the company complainant by the bridge as proposed, and therefore recommended that the bill be dismissed.

Exceptions were filed to this report, and were substantially dismissed by the court in an opinion by EWING, P. J., a decree, however, being entered fixing the height of the company defendant's bridge over the company complainant's land at twenty-one feet, requiring that the bridge should rest on abutments entirely outside of the company complainant's land, and granting to the company complainant the right to make use of the company defendant's bridge to cross the tracks thereon at grade upon such terms as should be specified by the court when the complainant resolved to make such crossing.

The company complainant thereupon took this appeal, assigning for error, *inter alia*, the dismissal of the exceptions to the master's report and the entry of the decree as above.

For appellant, *Messrs. Hampton & Dalzell*.
Contra, *A. M. Brown, Esq.*

Opinion by STERRETT, J. Filed January 2, 1882.

The right of the Pittsburgh and Western Railroad Company, under its charter and ordinances of the city of Allegheny, to locate and construct its railroad along the Allegheny and Ohio rivers, within said city from the eastern to the western boundary thereof, has been so conclusively shown by the learned master in his able and exhaustive report that it is unnecessary to add anything to the reasons given or authorities cited in support of that conclusion.

The Pittsburgh, New Castle and Lake Erie Railroad Company, which was succeeded in title by the appellee, was incorporated in September, 1877, under the provisions of the Act of April 4, 1868, and its supplements, with power to construct a narrow-gauge railroad from Allegheny City to the village of Wurtemburg, in Lawrence county, Pa. The company, immediately after its organization, commenced the work of construction,—obtained from the city of Allegheny the right of way for a single or double track “along the bank of the Allegheny river, or upon River avenue from the eastern terminus of the city to the east line of Sandusky street;” and in less than two years had completed the greater part of its road outside the

city limits. In August, 1879, all its property, rights, franchises, etc., were sold by the sheriff and duly conveyed to the purchasers, who associated themselves as the Pittsburgh and Western Railroad Company, by which name they were incorporated in October of that year. The new company, having thus succeeded to all the property, rights and franchises of the Pittsburgh, New Castle and Lake Erie Railroad Company, took possession of the road and proceeded to complete the same. In the early part of January, 1880, that portion thereof, between the eastern line of Sandusky street and the borough of Etna, was opened for trade and travel.

The main contention of appellant was that the Pittsburgh and Western Railroad Company has no authority to extend its road west of the eastern line of Sandusky street, because its predecessor in title had located, marked and determined the route of the road, and by accepting the ordinance granting the right of way to the east line of Sandusky street had selected and finally fixed that point as its western terminus; and also, because the appellee, after acquiring title, had completed the road to that point, purchased property and established its terminal depot there. On the other hand it was contended that the western terminus of the road had never been definitely settled, either by the original company or its successor; that it had always been the fixed purpose of both companies, while they respectively owned and controlled the road, to reach the western boundary of Allegheny City as soon as the necessary consent thereto of the city councils could be obtained. After a careful consideration of the evidence bearing on this subject, the learned master found in favor of the appellee, and in this we think he was clearly right. Without referring specially to the grounds on which his conclusions are based, it is sufficient to say that they are entirely satisfactory. The power to locate and establish the western terminus of the road in Allegheny City had not been established by any act of appellant or its predecessor; and, by virtue of its charter and the ordinance of September 9, 1880, granting the right of way to the appellee, it is clearly authorized to construct and operate its road along the bank of the Allegheny and Ohio rivers, or upon River avenue to the western boundary of the city, subject to the conditions and restrictions imposed by the ordinance last-mentioned.

It is true the original company was chartered to construct a road “from the city of Allegheny,” etc., but that clearly means from any point within the city. Moreover, companies

chartered either under the Act of 1849 or the Act of 1868, are expressly authorized to extend their respective roads into any city, town or village named in their charter as a terminal point, provided that in the case of an incorporated city the streets, lanes and alleys thereof shall not be occupied by any such railroad without the consent of the corporate authorities first had and obtained. In this case such authority was expressly given by ordinance.

Independently of the foregoing conclusion, and on the assumption that the eastern line of Sandusky street had been selected and fixed by the company as the western terminus of its road, the learned master also held that the appellee is authorized to construct its road from the east line of Sandusky street to the western boundary of the city, either under the power contained in the ninth Section of the Act of 1868, "to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public," or under the provisions of the Act of June 9, 1874, P. L., 282, in connection with the ordinance of September 9, 1880.

The branching power, given by the ninth Section of the Act of 1874, is sufficiently broad and comprehensive to authorize the construction of the road in question as a branch; and there is no valid reason why it may not be constructed from the terminus as well as from any other point on the main line of the road. The letter as well as the spirit of the section justifies the construction put upon it by the master.

The Act of 1874 declares, "That the proper authorities of any county, city, town or township of this State, respectively, be and they are hereby authorized and empowered to enter into contracts with any of the railroad companies, whose roads enter their limits, respectively, whereby the said railroad companies may relocate, change or elevate their railroads within such limits or either of them, in such manner as in the judgment of such authorities, respectively, may be best adapted to secure the safety of lives and property, and promote the interest of said county, city, town or township; and for that purpose the said authorities shall have power to do all such acts as may be necessary and proper to effectually carry out such contracts," etc. This is a general law, manifestly intended to provide for a class of cases in which, before the adoption of our present constitution, special legislation was frequently invoked.

As the natural result of the rapid development of our material resources and growth of population, especially in our larger cities, the public interest, convenience and safety from time to

time require changes, both in the location and construction of railroads. The Legislature, recognizing these facts, authorized the proper authorities of the respective municipal districts mentioned in the act to enter into contracts for making such changes as in their judgment may be best adapted to secure the safety of life and property and at the same time promote the interest of the particular municipality. The ordinance of September, 1880, which was accepted by the appellee and forms a contract between it and the city of Allegheny, is carefully drawn, and its provisions well guarded with the view of securing the several objects contemplated by the Act of 1874. If, in the judgment of the city councils, the terms and conditions on which the right of way was granted to the appellee were best calculated to secure the safety of life and property and promote the interest of the city, their right to make the contract cannot be questioned; and, it is equally clear that the appellee was authorized to accept and carry out the provisions of the ordinance.

We think, therefore, that on either of the grounds stated and discussed at length by the master, the appellee has the necessary corporate authority to construct its road from the eastern to the western boundary of the city on the route specified in the ordinances granting the right of way.

The corporate right of the appellee, thus to locate and construct its railroad, being settled, the next question is whether, for the purpose of either a grade or overhead crossing, it has a right to appropriate any part of the strip of land claimed by appellant under title derived from the Commonwealth. The validity of appellant's title and its right to hold and use the strip of land known as the canal lot for railroad purposes cannot be doubted. It has been definitely settled, by an unbroken line of decisions, that the Commonwealth acquired an absolute estate in perpetuity in the land taken and occupied for canal purposes; and by virtue of the act authorizing the sale of the main line of the public works and sundry mesne conveyances, that title, which for all practical purposes was a fee simple, became vested in the appellant company: *Commonwealth v. McAllister*, 2 Watts, 190; *Haldeman v. Penn'a Railroad Co.*, 14 Wright, 425; *Craig v. Allegheny City*, 3 P. F. Smith, 477; *Robinson v. West. Penn'a Railroad Co.*, 22 *Id.*, 316. By subsequent legislation the appellant was authorized to construct and maintain on the bed of the canal a railroad with branches, etc. While the company appellant is thus invested with an absolute title in fee to the canal lot, with the right to use the

same for railroad purposes, it by no means follows that its rights are so sacred or exclusive that, under a proper exercise of the power of eminent domain, its property may not be subjected to an easement in favor of the appellee or any other railroad company. If a crossing can be effected, either at grade or by means of a viaduct, without materially interfering with appellant in the exercise and enjoyment of its franchise, the right to make such crossing, upon paying or securing the payment of adequate compensation, cannot be doubted. As yet, appellant has not constructed a branch road at the point of the proposed crossing, but it is no doubt practicable to do so; and it is averred in the bill that in the judgment of its Board of Directors the time has come when a track should be built from low-water mark on the Allegheny river to the Pittsburgh, Ft. Wayne and Chicago Railway, by means whereof the company will have an outlet for its traffic to and from the river as the Commonwealth had when the canal was in operation. Assuming then that a transfer track will forthwith be constructed on the canal lot from the Pittsburgh, Ft. Wayne and Chicago Railway to low-water mark on the river, will the proposed crossing, by a viaduct at least twenty-one feet in the clear above low-water mark, supported by abutments, located entirely outside the lines of appellant's lot, materially interfere with the use and enjoyment of such transfer branch? The decided weight of the testimony is that it will not; and the finding of the master, concurred in by the court, is to the same effect. The decree is accordingly so framed that the appellee, in constructing its bridge across the lot in question, is required to place the same "at such an elevation as to leave at least twenty-one clear feet between the lowest part of said bridge and the datum line of the city of Allegheny." The decree further provides "that said bridge shall rest on abutments entirely astride of the lines of plaintiff's property, and shall not be supported by any pier or other support resting on plaintiff's land; that defendant's road and the whole width of ground taken at the crossing of plaintiff's land shall not exceed twenty-four feet, and the length thereof shall be the width of plaintiff's land, which is sixty-two feet, more or less." And, in view of the future practicability or necessity for the appellant company to cross appellee's road at grade, the court has also very properly secured to it that privilege, coupled with the right to make application to the court for a decree defining the terms and conditions upon which such grade crossing shall be constructed and maintained.

After a careful examination of the record, we find nothing in the decree of which the appellant has any reason to complain.

Decree affirmed and appeal dismissed at the costs of the appellant.

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**CORNELIUS BYLES, Defendant Below, v.
ROBERT I. HAZLETT.**

In an action against a physician for malpractice in the setting and treatment of a broken leg, the court in charging the jury, said, *inter alia*: "The plaintiff, by his manner upon the stand, and his misfortune, has no doubt, made inroads upon your sympathies—he certainly has upon mine. He is an intelligent man, and he appeared to be a candid witness upon the stand, so far as the court could observe." * * * "If the plaintiff is entitled to a verdict, he ought to have it, not only as a remuneration for himself, but as a protection to the public generally; because, if he is entitled to a verdict and does not get it, it would have a strong tendency to make surgeons, no matter how skillful they might be, reckless in their management of a case of this kind, or any other surgical case." *Held*, to be error.

Error to the Court of Common Pleas of Mercer county.

Case by Robert I. Hazlett against Dr. Cornelius Byles, to recover damages for injuries, alleged to have been the result of negligence or malpractice by the defendant, while employed professionally by the plaintiff.

On the trial, before McDERMITT, P. J., the facts appeared as follows: In November, 1879, the plaintiff, while driving a team of fractious horses, was thrown from his buggy, and suffered a severe fracture of his right leg, about half way between the knee and hip-joint. The defendant, a practicing physician and surgeon, was called in to take charge of the case, and attended Mr. Hazlett professionally for about three months. On his recovery, Mr. Hazlett's leg was somewhat shortened, and his foot and leg were everted to an angle of about forty-five degrees. He then brought this action. The testimony showed conclusively that the shortening of the leg was no more than usual in fractures of this kind, and the court instructed the jury to disregard that branch of the case. There was evidence on the part of the defendant that the eversion of the foot and leg was caused by a latent disease of the muscles of the hip, and not by the fracture.

The defendant presented, *inter alia*, the following point (7): "That the defendant having shown by the uncontradicted testimony of six medical experts, that the eversion of the plaintiff's leg is from the hip, and not from the fracture; then upon this branch of the case the plaintiff cannot recover, and the verdict must be in favor of the defendant. *Answer*. Whether your verdict should be in favor of plaintiff or

defendant, you will determine by giving to each and every part of the evidence, including the opinions of the medical experts as to the cause of such eversion, the weight to which it is entitled under the law given you in the general charge, and in the answers to the points of both parties. So explained, this point is answered in the negative. (First assignment of error.)

The court charged, *inter alia*, as follows:

"In our charge we made use of a remark which we can correct more easily orally than we could have done by writing, and which might mislead you. [We instructed you that if this was a case of a deformed leg, caused partly or wholly by the plaintiff's refusal to obey the proper instructions of the defendant, that then he could not recover. We have no recollection, on reflection, of any specific instruction or direction given by the defendant to the plaintiff which the latter disobeyed. But, there was some evidence, and that was what we were referring to in writing the general charge, that upon one occasion he drew a splint or a wedge in the night time from the region of the fracture; and there was also some evidence of some other witnesses in regard to him having his foot turned to one side, and his explanation or the explanation of his attendant at the time, was that the reason of so turning his foot in that direction, was that he rested more easily.] (Second assignment of error.) But, then in regard to his obedience or disobedience of the directions given by the defendant, you have the admission of Dr. Byles, as testified to by one or two or possibly more witnesses, as to how he behaved. He behaved like a man and not like a baby, and that he obeyed his instructions, and so on. I do not remember exactly what he did say, but then it is all for you.

"There is nothing, gentlemen, in this case upon which the plaintiff can recover except for the eversion or turning out of the limb, because, according to the testimony of the plaintiff's own surgeons, as well as those of the defendant, as far as they were examined upon that point, the treatment was good surgery as to the length of the limb, and, therefore, you can just omit its consideration entirely, unless you should find that it would enable you in some degree to ascertain whether the eversion was caused in part by the same cause that shortened the leg, if it was shortened by improper treatment. But the surgeons seem to think it was not—it was a natural shortening growing out of the fracture.

"If you should find that the plaintiff is entitled to recover, then you should determine how much. In a case of this kind the plaintiff would be entitled to recover for any unneces-

sary pain that he suffered or is suffering, which would have been avoided if the defendant had used that skill and care which we have described both in the general charge and in answer to the points. If, although there might in the end be a perfect recovery, still if the plaintiff suffered more pain than he ought to have suffered under proper treatment, he would be entitled to recover for that, if not for permanent injury.

"Now, when you come to the permanent injury sustained by the plaintiff, and if you find that the defendant is responsible for it, you must estimate that by taking into account the age that he was when he arose from his bed, or ought to have arisen, his capacity for labor and the probable duration of life, as you can estimate it best by your own observation of the ordinary duration of life. We can say nothing to you on that branch of the case of which you are quite as competent to judge as we are ourselves.

"You were no doubt struck, as the court certainly was, with the manner in which this case was tried from the opening speech down to the closing in a spirit, I think, of the utmost fairness and candor, and certainly in a way that made our listening to it a pleasure rather than anything else; and it will be when you go out an unpleasant duty, no doubt, for you to perform to determine whether you ought to render a verdict for the plaintiff or for the defendant, or if for the plaintiff, how much.

"It is a very important case, not only to the plaintiff, but to the community and to the surgical profession. It is no ordinary case, gentlemen, and you ought to give it your utmost care and deliberation. [The plaintiff, by his manner upon the stand and his misfortune, has no doubt made inroads upon your sympathies—he certainly has upon mine. He is an intelligent man, and he appeared to be a candid witness upon the stand, so far as the court could observe.] (Third assignment of error.) But still that is for you. But on the other hand, the defendant, when he came on the stand, engendered in my mind also strong sympathies for him. He no doubt did what he thought was best under the circumstances; that is, you will most likely find so; at least approximate it so closely to that that if you do in the end find that he was negligent, you will not consider that it was wanton or gross negligence; but still that would be for you, and therefore you would not likely, unless you would find that it was wanton or gross negligence, render a very heavy verdict against him; that is, not at all what would be termed vindictive, or beyond the actual damage sustained. But you will not let these considerations sway

you from the evidence and the law. [If the plaintiff is entitled to a verdict, he ought to have it, not only as remuneration for himself, but as a protection to the community generally; because, if he is entitled to a verdict and does not get it, it would have a strong tendency to make surgeons, no odds how skillful they might be, reckless in their management of a case of this kind, or any other surgical case.] (Fourth assignment of error.) But, on the other hand, if he should not be entitled to a verdict, he certainly ought not to have one, because that would operate oppressively upon the surgical profession, which ought not to be. The surgeons have rights as well as the public; they both have their rights, and you will see to it that they both have them in this case without any regard to the consequences. It is no difference to you whether there will be one case or fifty hereafter caused or suppressed by anything that you do; you only look to the law and the evidence before you, and you will take them to your room with you, and you will make up your verdict calmly and deliberately, without being swayed to the right or the left by passion, feeling or sympathy for either the plaintiff or defendant."

Verdict and judgment for plaintiff for \$1,100, to which the defendant took this writ, assigning as error the refusal to affirm the seventh point without qualification, and the portions of the charge in brackets.

For plaintiff in error, defendant below, *Messrs. Mason and Zeigler & Bowser.*

Contra, Messrs. Miller, Stranahan and Mehard.

Opinion by GREEN, J. Filed January 9, 1882.

We think the third and fourth assignments of error are sustained. It is not within the legitimate province of a court when instructing a jury in a case of this kind to express sympathy with the plaintiff or with the defendant. It was an action for malpractice. The question was one of strict right. If there was no malpractice on the part of the defendant there was no right of recovery, no matter how unfortunate was the condition of the plaintiff. The defendant had nothing whatever to do with the original occasion of the plaintiff's injury, and should not incur the possibility of a verdict against him by any expression of sympathy for the plaintiff on account of his injury. Such expressions are entirely proper in a humanitarian point of view, but are inappropriate and hazardous to the administration of justice when they proceed from a court in the trial of a litigated cause such as this. This is especially true in view of the

peculiar circumstances of this case. The results of the treatment complained of by the plaintiff were the undue shortening of his leg and its excessive eversion. But the testimony of both the plaintiff's and the defendant's witnesses was so conclusive that there was no undue shortening, that the court withdrew that part of the case from the consideration of the jury entirely. Having read the whole of the testimony bearing upon this part of the case with care, we are convinced that the learned judge was entirely right in so doing. This left the eversion as the only remaining ground upon which the plaintiff could in any event recover. It thus became necessary that this branch of the case should be considered both by the court and the jury with entire impartiality, and with much care and circumspection. The defendant's theory was that the eversion was occasioned by, or was the result of, some disease of the hip, which produced an atrophied condition of the muscles leading from the hip, and that this was the direct cause of the eversion complained of. This theory was supported by the direct testimony of several surgeons, and does not appear to have been contradicted by the testimony of the plaintiff's surgeons. If this was the true cause of the eversion of the plaintiff's leg, the defendant was not necessarily responsible for it under any aspect of the testimony, and may not have been responsible at all in any view of the case. After a most careful examination of the charge of the learned judge of the court below, we fail to discover that any allusion was made to this testimony, or that the subject was in any manner presented to the consideration of the jury. They were told they could allow nothing for the shortening of the leg, because there was no evidence of bad surgery as to that, and then they were instructed as to the measure of damages in the event of a recovery. The question whether the eversion was the result of a diseased condition of the hip, or muscles leading from it, or of defective treatment of the fracture by the defendant, was entirely omitted in the charge. We think it should have been distinctly presented, with appropriate reference to the respective contentions of the parties, and to the testimony bearing upon either side.

The objectionable language specified in the last assignment would have a tendency to inflame the minds of the jury against the defendant, and in a case of the kind no such incentive should be applied. It is true that qualifying language was used in the immediately succeeding portion of the charge, but that is no excuse for the previous utterance. It would have been

been better to have omitted the whole of it. It was not called for by anything in the case, and therefore was unnecessary and inapt. We are of opinion that the matter assigned for error in the third and fourth specifications is justly subject to the criticism expressed in the case of *McCandless v. McWha*, 10 Harris, 273, and on those specifications the cause must be reversed. We regard the answer to the defendant's seventh point as inadequate; but as we do not think the point should have been absolutely affirmed, we do not reverse on the first assignment. Nor do we sustain the second assignment. The evidence as to disobedience of instructions on the part of the patient was not so free of controversy as to justify the court in assuming it to be conclusively proved.

Judgment reversed and venire facias de novo awarded.

N. HOLMES & SONS, Plaintiffs Below, v. Mrs. JENNIE IHMSEN et al.

Upon a *scire facias* to revive a judgment entered against a married woman as executrix, judgment cannot be entered against her individually. A judgment against a married woman, not for necessities, being void, the only effect of the original judgment could be to charge her as executrix, and a judgment upon such *scire facias*, charging her personally, will be set aside.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This is one of a number of causes growing out of the will of Charles T. Ihmsen, deceased, which provided for carrying on the business of the firm of which he was a member, after his death. These cases have been reported in 23 PITTSBURGH LEGAL JOURNAL, 117; 26 *Id.*, 99. In a former case arising under this will, the Supreme Court, in passing upon the liability of the executors carrying on the business of their testator under it, said that "the debt was incurred by the persons acting as executors personally, though warranted by the powers contained in the will. As to them the judgment was personal."

The present case was entitled as follows: John G. Holmes, John H. Ebbert, W. R. Holmes and James J. Donnell, partners as N. Holmes & Sons, *versus* James E. Ledlie, Mrs. Elizabeth Ihmsen, now McLaughlin, Executrix and Executrix of Charles T. Ihmsen, deceased, and William Ihmsen, partners as C. Ihmsen & Sons, and judgment was entered against the defendants in default. Upon this judgment a *scire facias* was issued. William Ihmsen having died in the meantime, the title of the action in the *scire facias* was as follows: N. Holmes & Sons *versus* Mrs. Jennie Ihmsen and T. Brent Swearingen, Executrix and Executor of Wil-

liam Ihmsen, deceased, and Elizabeth McLaughlin, widow of Charles T. Ihmsen, deceased, and William McLaughlin, her husband, in right of said Elizabeth McLaughlin and Annie Ihmsen, etc., Testamentary Guardians of the minor children, heirs and residuary devisees of Charles T. Ihmsen.

Upon this *scire facias* judgment was entered against "Elizabeth McLaughlin and William McLaughlin in default *sec. reg.*"

The McLaughlins asked to have the judgment against them set aside for the following reasons:

1. Because the original judgment on which the *scire facias* issued was against Mrs. McLaughlin as executrix, and was not a personal judgment.

2. Because at the time of its entry she was a married woman and it is therefore void.

3. Because no rule of court authorizes the entry of judgment in default of an affidavit of defense.

4. Because W. F. McLaughlin had filed an affidavit of defense on behalf of his wife.

The court below set aside the judgment upon the first two reasons, saying that "the record sufficiently shows that at the time of the bringing of the original suit, Elizabeth McLaughlin was a married woman, and that the action was not for necessities, and that as to her individually, the judgment is void. The only effect of the judgment is, therefore, to bind her as executrix. The judgment entered against her on the *scire facias* is absolute and incorrect." It was contended by the plaintiff in error and below that the judgment was personal, that the naming of the defendants as executors, etc., was mere surplusage, and that the merits of the original judgment could not be inquired into for the purpose of furnishing a defense to a *scire facias*.

The defendants in error contended that on the *scire facias* a complete change in the relation of Mrs. McLaughlin to the action was made; that the rule of court upon which the plaintiff in error depended did not apply to executors, administrators or terre-tenants, and also, if it did, then the record shows that when the suit was brought Mrs. McLaughlin was a married woman, and that the action was not for necessities for herself or family, but was for a debt due by the firm, of which her former husband was a member, and therefore the judgment against her was absolutely void.

For plaintiffs in error and below, *Messrs. Hampton & Dalzell*.

Contra, *Messrs. Barton & Son*.

PER CURIAM. Filed November 21, 1881.

The only effect of the original judgment was

to bind the married woman as executrix. A judgment against a married woman, not for necessities, is void, nor can a revival infuse life into it. The court below were right, therefore, in striking off the judgment entered against her on the *scire facias*. *Order affirmed.*

DEAN & SON'S APPEAL.

The assets of an insolvent estate belong to the creditors in the proportion of their respective claims at the time of the assignment.

In proceedings to dissolve an insolvent insurance company the corporation is dead for every purpose except that of distribution of its assets among its creditors from the time of the decree of dissolution, and only those whose position and rights as creditors were fixed at the time of dissolution can be recognized as such in the distribution. Policies on which losses are sustained after dissolution are not entitled to participate in the distribution except upon the amount of the premium paid.

This case appears to be one of first impressions in Pennsylvania.

D. held a policy of fire insurance on which a loss occurred several months after the dissolution of the company was declared and during the life of the policy. They claimed a distribution upon the amount of the loss. *Held*, that they were entitled only to a dividend upon the amount of the premium paid.

Appeal of M. Dean & Son from the decree of the Court of Common Pleas of Dauphin county.

The facts in this case are as follows: On the 28th day of January, 1878, M. Dean & Son, insured certain property of theirs to the amount of seven hundred dollars in the Newtown Fire Insurance Company. They paid to the company the premium therefor, and the company in consideration thereof agreed by its policy "to make good unto the said assured, their heirs, executors, administrators and assigns, all such immediate loss and damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property except as herein provided, as shall happen by fire or lightning to the property so specified, from the twenty-first day of January, 1878, at 12 o'clock noon, to the 21st day of January, 1879, at 12 o'clock noon."

On the 18th day of May, 1878, the Attorney-General filed a suggestion of complaint against the said insurance company, in the Court of Common Pleas of Dauphin county, on the ground of the insolvency of the company, and the court, on the 30th day of March, 1878, found the said company to be insolvent, and decreed that the said Newtown Fire Insurance Company be dissolved, and appointed A. Wilson Norris, Esq., Receiver thereof.

On the 29th day of November, 1878, six months after the dissolution of the company by the decree of the court, but two months before the

expiration of the policy, and before any distribution by the receiver, a fire occurred by which the property insured was destroyed to the amount of eight hundred dollars. There was a condition in the policy in the following words: "The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a rateable proportion of the premium for the unexpired term."

When a receiver had been appointed he sent to all policy holders the following notice:

"PHILADELPHIA, June 7th, 1878.

"To
"DEAR SIR:—The Newtown Fire Insurance Company has, by decree of the Court of Common Pleas of Dauphin county, Pennsylvania, made on the 27th day of May, 1878, been dissolved, and the undersigned appointed Receiver, to whom you are hereby notified to send the policies of said company now held by you, for the purpose of cancelling and calculating the amount of the return premium that may be due you. A proper receipt will be sent you."

He did not offer or tender then, or at any other time, a return of any part of the premium.

The claim was duly proved against the estate in the hands of the receiver, but the auditor declined to award the claimants a *pro rata* amount of their loss equal to that awarded to policy holders, whose loss occurred *prior* to the dissolution of the company by the decree of the court, because claimants' loss had occurred *after* such dissolution, but awarded them a *pro rata* share of the premium they had paid.

Exceptions were filed to the auditor's report, as to this award, but the court below overruled the exceptions and confirmed the report of the auditor.

From this decision the appellants have appealed, and now claim that, their loss having occurred before the expiration of their policy, and before the distribution of the assets, they stand on an equal footing with those policy holders whose loss occurred before the dissolution, and the damages awarded them should be measured by the actual loss they have sustained.

For appellants, *Ludovic C. Cleemann, Esq.*
Contra, *Francis Jordan, Esq.*

Opinion by PAXSON, J. Filed October 3, 1881.

This was an appeal from the decree of the court below making distribution of the funds in the hands of A. Wilson Norris, Esq., Receiver of the Newtown Fire Insurance Company. Under proceedings instituted by the Attorney-General, the said company was on the 30th of May, 1878, adjudged to be insolvent, and a decree dissolving it and appointing a receiver was made. The latter issued notice to all parties insured to send him their policies in order that they might be cancelled, and a calculation made of the amount of the return premium due. The ap-

pellants are the holders of a policy of \$700, which they declined or omitted to send to the receiver as requested. About six months after the dissolution of the company and before the expiration of the policy, a loss occurred by fire to the extent of \$800, and the appellant's claim a dividend thereon out of the assigned estate. The auditor and the court below rejected the claim and allowed only a dividend upon the amount of premium. It was to this ruling the present appeal was taken.

The case appears to be one of first impressions so far as this State is concerned. No case directly in point has been cited from our books. Those outside the State, so far as they apply, are against the appellants. In *Miller's Appeal*, 11 Casey, 481, it was held that, in the case of a voluntary assignment, the creditors become the owners of the assigned estate by virtue of the assignment, and their ownership was fixed by the amount of their respective claims when the assignment was made. It follows from this that in such cases the rights of the parties are fixed as of the date of the assignment: *Miller's Appeal* has been followed in a number of later cases and is settled law.

We see no reason why the same principle shall not be applied to the case of an insolvent corporation which has been dissolved by a decree of the court. The corporation is dead for every purpose. But one duty remains, and that is to distribute its assets among its creditors. Even this the corporation is powerless to do, and the Act of Assembly devolves that duty upon a receiver to be appointed by the court. Who are the creditors entitled to participate in the distribution? Clearly those who were such at the time of the dissolution of the corporation. At that time the appellants were creditors to the extent of the premium they had paid. Beyond this they had no claim upon their policy, for no loss had occurred. A possibility of loss in the future would not be a claim upon the assets, and if it were it would be common to all policy holders. The distribution of the assets was an immediate duty on the part of the receiver; its delay is due merely to the fact that time is necessary to realize them. If, therefore, distribution had been practicable immediately after the appointment of the receiver, the appellants would have received only a dividend upon the premium they had paid. Does the fact that the distribution was necessarily delayed change the rights of the parties and introduce a new class of creditors who were not creditors at the time of the dissolution? We find neither reason nor authority for such a proposition. In *Mayer v. The Attorney-General*, decided in the Court of Errors

of New Jersey, at June Term, 1880, (see *Albany Law Journal*, Vol., 23 p. 981), it was held: "The day on which the insolvency occurred, as adjudged by the decree, fixes the time to which the several claims must be referred for adjustment, and not the date of the decree itself." And in the case of the *Commonwealth v. Massachusetts Insurance Co.*, 119 Mass., 57, it was said by the court: "The proceedings under the statute are in the nature of proceedings in insolvency, the object of which is to close up the affairs of the corporation as speedily as possible. The object would be defeated if the fund in the hands of the receiver is liable for future losses, for the fund could not be distributed until the longest policy had expired by lapse of time." While this was said of a mutual company the reasoning applies equally to the case in hand. The object of this proceeding is a prompt distribution of the assets. The principle contended for by the appellants, would, if successful, make this impossible, or at least intolerably inconvenient. If the rights of creditors are not fixed as of the date of dissolution, when do they become fixed? If we take the distribution as the period, then the appellants would obtain no advantage over other policy holders who might sustain a loss the day after. The former would be paid while the latter would get nothing. Such a rule could not be enforced without producing injustice, and we would be driven to delay distribution until all the policies had expired. As some may be, and doubtless are, perpetual, the doctrine contended for, carried to its logical conclusion, becomes an absurdity.

Decree affirmed and appeal dismissed at the costs of the appellants.

THE GERMAN INSURANCE COMPANY, Defendant Below, v. THE EDINBURGH FURNITURE COMPANY.

Distribution of assets of an insolvent insurance company. Policies on which losses were sustained after dissolution not entitled to participate except upon amount of premium paid.

Dean's Appeal, supra, followed.

Error to the Court of Common Pleas of Erie county.

Opinion by GREEN, J. Filed November 7, 1881.

In the case of the *Appeal of Dean & Son*, from the decree of the Court of Common Pleas of Dauphin county, decided at the present term [see preceding case], we determined the identical question involved in this case. That was an appeal from the decree distributing the assets of an insolvent insurance company among its creditors, the company having been dissolved by proceedings for that purpose, under the Act

of 1873. The appellants held a policy on which a loss occurred several months after the dissolution of the company was declared, and during the life of the policy. They claimed a distribution upon the amount of the loss, but the court below rejected the claim and allowed them only a dividend upon the amount of the premium paid. On appeal from that decision, the decree of the court below was affirmed. Although the present case is an action on the policy, the principle which controls the question at issue is precisely the same as that expressed in the case referred to.

It was there held that the assets of an insolvent estate belonged to the creditors in the proportion of their respective claims at the time of the assignment; that in proceedings to dissolve an insolvent insurance company the corporation is dead for every purpose except that of distribution of its assets among its creditors, from the time of the decree of dissolution; that only those whose position and rights as creditors were fixed at the time of dissolution could be recognized as such in the distribution, and that policies on which losses were sustained after dissolution, were not entitled to participate in the distribution except upon the amount of the premium paid. As the loss did not occur till after the decree of dissolution, the holder of the policy was not a creditor for the amount of the loss at the time when the rights of all creditors were fixed. If such a claim were allowed in one case the same allowance must be made in all, and it would necessarily follow that final distribution could not be made until all the policies issued by the company had expired. It is unnecessary to repeat the very forcible reasoning contained in the opinion of Mr. Justice PAXSON in the case of *Dean & Son's Appeal* as it is of such recent utterance and so entirely convincing. It disposes of the present case as, here as well as there, the loss did not occur until after the decree of dissolution. At the time of that decree the plaintiff was not a creditor of the corporation defendant and only became such by force of the decree, for the amount of the premium paid. *Judgment reversed.*

For plaintiff in error, defendant below, *Geo. W. DeCamp, Esq.*

Contra, J. W. Wetmore, Esq.

Orphans' Court.

Estate of JANE BURNS, Deceased.

A valid gift can only be made by words *in present*, accompanied by such delivery of possession as makes the disposal of the thing irrevocable.

Opinion by OVER, J. Filed February 3, 1882.

It is a well settled rule of law that a valid gift can only be made by words *in present*, accompanied by such delivery of the possession as makes the disposal of the thing irrevocable. Applying this rule to the facts of this case, there can be no doubt that the decedent did not make a valid gift of her furniture and household effects to her daughter Eveline.

The only testimony offered to establish the gift was that of the administrator. He testified that Eveline and he requested their mother to fix her business, and she replied, "There is no use for that;" "these things in the house I give to Eveline." Eveline had been living with her mother prior to the time this conversation occurred and remained with her until her death, five years thereafter.

There was no change made in the possession of the furniture and household effects. But they remained in the house until the decedent's death, and were, no doubt, used by her and her daughter Eveline, the same as before this conversation. It was in reply to a request to fix her business; that is, make her will, that the decedent said there was no use, as she gave the property to Eveline. This indicates that it was her intention that the gift should only take effect as a testamentary disposition of the property, and that she intended to retain its possession. There is no doubt from the evidence in this case that Eveline could not have recovered possession of the property from her mother. There being then no evidence of delivery of possession, one of the essential elements of a valid gift is wanting: *Campbell's Estate*, 7 Pa. St., 100; *Withers v. Withers*, 10 Id., 301.

The evidence is too indefinite to fix the value of this property. It is still in the possession of Eveline. And as the administrator appears to have acted in good faith in not taking possession of it, he should have the opportunity of getting possession of and selling it, and can account for the proceeds in a future account.

It appears from the testimony that the decedent had some money and bonds in her possession, not long before her death, which did not come into the hands of the administrator. The evidence occasions some doubts as to whether or not the administrator used due diligence in his investigation in regard to the same. He can pursue his investigations farther, and if successful, account for what he shall receive.

For accountant, *Messrs. Miller & McBride.*

For exceptant, *Hon. Thos. M. Marshall.*

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PITTSBURGH, PA., MARCH 22, 1882.

Supreme Court, Penn'a.

B. F. FLENNIKEN et al. v. MORGAN R.
WISE et al.

MORGAN R. WISE'S APPEAL.

A discharge in bankruptcy cannot be plead in bar to a *scire facias* on a judgment confessed, but may to the original debt, if the judgment be opened.

Appellant was on December 31, 1875, adjudicated a bankrupt, and on July 17, 1879, discharged under the Bankrupt Law. On January 21, 1876, a judgment was confessed against him on a note, the first notice of which he had on January 17, 1881, when a *scire facias* to revive was issued thereon and served on him. An application to open the judgment was refused. *Held*, to have been error; that having applied for relief directly after he received notice or knowledge of the judgment, *laches* could not be justly imputed to him.

In Pennsylvania it is the right of a defendant in a judgment confessed against him, by virtue of a warrant of attorney, to have it opened when he promptly applies and shows a legal or equitable defense which existed at and before the time it was entered.

Kneeder's Appeal, 11 Norris, 428, approved and followed.

Appeal from the decree of the Court of Common Pleas of Greene county.

Opinion by TRUNKEY, J. Filed November 25, 1881.

No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and such suit shall be stayed upon application of the bankrupt to await the determination of the court in bankruptcy on the question of discharge, but if the amount be in dispute by leave of said court, the suit may proceed to judgment for the purpose of ascertaining the amount due, and execution shall be stayed: R. S. U. S., Sec. 5106. A discharge in bankruptcy, subject to certain exceptions named in the statute, shall release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy: *Id.*, Sec. 5119.

In an action upon a judgment which was obtained against a defendant after he was adjudicated a bankrupt and before his discharge, upon a debt provable under the Bankrupt Laws, the original debt is merged, and the certificate

of discharge granted subsequently is no defense: *Bradford v. Rice*, 102 Mass., 472. The original debt is merged in and extinguished by the judgment, and the judgment is a new debt which is not affected by the discharge: *Thompson v. Hewitt*, 6 Hill, 255. In New York the practice has been to permit one cast in judgment to avail himself of a bankrupt or insolvent discharge by motion and order for a perpetual stay of execution thereon. This is allowed in cases when he had no opportunity to plead his discharge. If fraud be alleged or ground for impeaching the discharge, the court would open the case so that that question could be tried. Where a trial had determined the amount due, before the petition was filed and the defendant adjudicated a bankrupt, and the judgment entered after the commencement of proceedings in bankruptcy, it was held that a stay of proceedings would not have availed to enable the defendant to plead his discharge, and that he was entitled to an order for perpetual stay of execution: *Monroe v. Upton*, 50 N. Y., 593.

In a procedure in bankruptcy, on July 17, 1879, Wise was discharged of and from all debts and claims, provable under the Bankrupt Laws of the United States, and which existed on December 31, 1875, on which day the petition for adjudication was filed by his creditors, excepting such debts, if any, as are by said laws excepted from the operation of a discharge in bankruptcy. On January 21, 1876, judgment was entered by confession against Wise and Brown on a note dated October 27, 1875, by virtue of a warrant of attorney embodied in said note. The first knowledge Wise had of the entry of this judgment was when the writ of *scire facias* for its revival was served on him, January 17, 1881, and he applied for the rule to open the judgment at the term to which said writ was returnable.

Judgments confessed by virtue of warrants of attorney, whether entered in term or vacation, are without the actual knowledge of the court, and without notice to the defendant. While such a judgment stands, there is no difference in legal effect between it and a judgment on the verdict of a jury; but the court in which the judgment is confessed, will open it and let the defendant into a defense upon his showing cause: *Hopkins v. West*, 2 Nor., 109. In the trial of a *scire facias* on a judgment, no inquiry into the merits of the original judgment can be had, and the only defense is some matter arising since the judgment: *Dowling v. McGregor*, 10 Nor., 410. The original judgment is as conclusive in a *scire facias* to revive, as in an action of debt upon it. In Pennsylvania it is

the right of a defendant in a judgment confessed against him, by virtue of a warrant of attorney, to have it opened when he promptly applies and shows a legal or equitable defense which existed at and before the time it was entered. He need not resort to a court of equity for an injunction against its collection. The appeal to open the judgment is to the equitable powers of the court, and the court in the exercise of a sound discretion, grants or refuses the prayer as a chancellor would: *Kneedler's Appeal*, 11 Norris, 428.

This judgment ought to be opened that a trial may be had upon the merits. It was entered after the commencement of proceedings in bankruptcy against Wise, and before he obtained his discharge. He had no opportunity to ask stay of proceedings until the question of his discharge should be determined. He applied for relief directly after he received notice or knowledge of the judgment, and laches cannot be justly imputed to him. He cannot plead the discharge in bar to the *scire facias*, but may to the original debt, if the judgment be opened.

The order and decree is reversed, and the rule to show cause why the judgment, as against Morgan R. Wise, should not be opened, is made absolute; the record to be remitted for further proceedings. Appellees to pay costs of appeal.

For appellant, *Messrs. Downey & Garrison.*
Contra, Messrs. Black & Phelan.

M. C. EGBERT, Defendant Below, v. N. H. PAYNE.

If there is no testimony tending to prove a gift, either for a proper or improper purpose, it is error for the court to suggest an improper purpose by which the jury may be prejudiced and misled.

A. deposited money in the bank to the credit of B. as his agent. The deposit was overlooked and forgotten by the bank and both parties for a number of years. In a contention subsequently arising between A. and B. as to the ownership of the money,

Held, to be error for the court to charge in the face of testimony to the contrary, that there was no evidence that the money was deposited either for a general or special purpose connected with the business of A.

Howard Express Co. v. Wile, 14 P. F. 8., 201, approved.

Error to the Court of Common Pleas of Crawford county.

This was a feigned issue to May Term, 1881, arising on the following facts: N. H. Payne was agent for the firm of Egbert & Brown, and for Egbert individually, in the business of producing and shipping oil; the principal office of the firm being in New York, but their business being conducted along Oil Creek and also at Pittsburgh and Philadelphia. While Payne was thus acting as agent, large sums of money were deposited by the firm and by Egbert in

the banks of Titusville and other places in the oil country to the credit of Payne, to be used by him in the business of the firm and of Egbert.

In January, 1870, Egbert deposited in the Second National Bank of Titusville to the credit of Payne, \$1,833.12. Credit was entered on the bank-books for that amount to *P. H. Payne* instead of *N. H. Payne*, and the funds lay in the bank without the knowledge of Payne and forgotten by Egbert, until the fall of 1880, when notice having been given by the bank, it was claimed by both parties. Both parties brought suit against the bank and on petition of the bank, the court (CHURCH, P. J.), awarded this issue, in which Payne was made plaintiff and Egbert defendant. The plaintiff claimed that the deposit was made in his name, and that *prima facie* a deposit in a bank belongs to him in whose name it is made. The defendant claimed that the money was deposited by him for a special purpose to plaintiff's credit as agent, and that never having been used for that purpose, it belonged to him.

Verdict and judgment thereon for the plaintiff for the amount on deposit.

The defendant thereupon took this writ, assigning for error that portion of the court's charge in which the jury are instructed that, unless the plaintiff has proved to their satisfaction that "the money is his, and that it was deposited by him for a specific purpose, viz., in the name of Payne, to be used by him as agent in the business of Egbert & Brown or Egbert, it is an executed gift and he cannot take it back. There is no evidence of a specific purpose."

For plaintiff in error, *Messrs. A. B. Richmond & Son* and *J. B. Brawley*.

Contra, C. Heydrick, Esq.

Opinion by STERRETT, J. Filed January 2, 1882.

The single question of fact, involved in this feigned issue, was whether the money deposited in the Second National Bank of Titusville, January 28, 1870, to the credit of Payne, the plaintiff below, belonged to him or to Egbert, the defendant.

The deposit having been made in the name and to the credit of Payne, the money was *prima facie* his; and the burden was thus cast on Egbert of proving that it belonged to himself and not to the plaintiff below. He undertook to do this, by proving that the money was deposited by himself, as was shown by the deposit slip in his own handwriting, and by introducing other testimony, tending to prove that the deposit was made, not for the individual use and benefit of Payne, but for the purpose of

enabling him to use it in the business, either of Egbert himself, or of Egbert & Brown, of which firm Egbert was a member, and for both of which parties Payne was then acting as agent; and that the money, having never been applied to the use of either Egbert & Brown or Egbert, still belonged to the latter. A single question of fact, solely for the consideration of the jury, was thus presented.

There appears to have been no exception to the admission or rejection of testimony, at least none is urged here, but the complaint is that the charge of the court was calculated to prejudice and mislead the jury. In that portion of the charge which constitutes the first assignment of error, the learned judge, referring to Egbert, the defendant below, says: "Has he explained to your satisfaction that it was his money? If he gave it to Payne for same purpose; if he gave it to Payne for any illegal or improper purpose, it would be an executed gift, and he could not take it back." This suggestion of a gift for an illegal or improper purpose was unwarranted by anything that appears in the record, and was calculated to invite the jury to an inquiry in which their only guide was vague suspicion or conjecture. There was no testimony tending to prove a gift either for a proper or an improper purpose. It is scarcely necessary to cite authorities to show that this was error. In *Stauffer v. Latshaw*, 2 Watts, 65, it is said: "To submit a fact, destitute of evidence, as one that may nevertheless be found, is an encouragement to err which cannot be too closely observed or unsparingly corrected." The same general principle is recognized in *Sartwell v. Wilcox*, 8 Harris, 117; *Newbaker v. Alricks*, 5 Watts, 183; *Whitehill v. Wilson*, 3 P. & W., 405.

The contention of the defendant below was fairly and clearly presented in his prayer for instructions. The testimony was quite sufficient to justify the submission of that proposition to the jury, and it should have been affirmed without the qualifications complained of in the second assignment. Some of the remarks made by the learned judge in that connection were not warranted by the testimony and cannot be regarded as harmless. On the contrary, when considered in connection with the previous suggestion that the money may have been given "for an illegal or improper purpose," they were calculated to mislead the jury, and for aught we know may have had that effect.

In that portion of the answer covered by the third assignment, the defendant's point was virtually negatived, and the case withdrawn from the jury, by an assumption of fact which

the testimony did not justify. Speaking of the money, the learned judge says: "Was it deposited for a specific purpose, to wit: to be used in the business of Egbert or Egbert & Brown, by Payne as their agent? If not, then it would seem to be a gift, in some mysterious way, to this plaintiff. There is no evidence of a specific purpose for which this was deposited, because there is no evidence upon either side for a specific or general purpose." Being thus instructed that there was no evidence that the money was deposited either for a general or a specific purpose connected with the business of Egbert or the firm of which he was a member, the jury were necessarily driven to the conclusion that it "was a gift, in some mysterious way," to Payne, as suggested by the court, or, that there was nothing in the case to rebut his *prima facie* right to the money, based on the fact that it was deposited to his credit. In either view, the result would be the same,—a verdict in favor of the plaintiff below. The radical error in this part of the answer is in assuming that there was no testimony, for the consideration of the jury, tending to sustain the contention of the defendant below. If such had been the fact, it would have been the duty of the court to have withdrawn the case from the jury by directing a verdict for the plaintiff; but there was evidence, both direct and circumstantial, which it was the province of the jury to consider, and from which they might perhaps have found the facts substantially as embodied in defendant's proposition. The rule is as stated by the present Chief Justice in *Howard Express Co. v. Wile*, 14 P. F. Smith, 201: "Where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury, however strong or persuasive may be the counter-vailing proof." Among other items of evidence tending to sustain defendant's view of the case, is the letter addressed to him by Payne in October, 1880, in which the latter, speaking of the deposit, says: "On a reference to the deposit slip, I think the '*N. H. Payne*' is in your handwriting. I am unable thus far to find my old book of that date to show how it came to be overlooked. The probability is that you deposited it to save bringing it home or for some special purpose and reported to me, and I have forgotten to draw it." Other facts and circumstances, which need not be referred to, had a similar bearing; and, on the whole, we are of opinion that the plaintiff in error has just reason to complain of the charge and the manner in which the case was submitted to the jury.

Judgment reversed and venire facias de novo awarded.

District Court, United States.

Western District of Pennsylvania.

IN ADMIRALTY.

HOSTETTER & SMITH v. R. C. GRAY et al.

- (1.) If nothing is expressed to the contrary in the bill of lading, established usages relating to a voyage are impliedly made part of the contract.
- (2.) After the express provisions of the contract, the usage of the trade is the predominating test as to deviation, and of what belongs to the voyage and the proper course in prosecuting it.
- (3.) Where a tow-boat having a fleet of barges in tow on a voyage from Pittsburgh to New Orleans landed at Mt. Vernon, Indiana, and the fleet was there safely moored and a single barge detached therefrom and towed back up stream to take on cargo at four or five different points on the Indiana and Kentucky shores, all within the distance of three miles, *Held*, that it was not a deviation, it appearing that the course pursued was in conformity with the usage of the trade—a usage which tends to cheapen the cost of transportation, facilitates business and conduces to the safety of the whole tow.
- (4.) The exception in a bill of lading of the dangers of navigation and unavoidable accidents, relieves the carrier from liability for loss of the cargo of a barge which sunk by striking, without negligence, some unknown and concealed obstruction in the Ohio river.

Opinion by ACHESON, D. J. Filed February 18, 1882.

On December 6, 1874, the steam tow-boat "Iron Mountain," having in tow several barges (one called "Ironsides, No. 3,") partly loaded with a miscellaneous cargo, left Pittsburgh bound for New Orleans. The libellants shipped by the barges 2,000 boxes of bitters and 18 boxes of show cards, which were placed on "Ironsides, No. 3," the bill of lading stipulating that the goods were "to be delivered without delay, in like good order, at the port of New Orleans, La., the dangers of navigation, fire and unavoidable accidents excepted." At the argument it was claimed in behalf of the libellants that there was a verbal agreement touching the course of transportation additional to the bill of lading, but the libel itself asserts that in "confirmation of said agreement" the bill of lading was signed, and the evidence fails to establish such alleged verbal contract. The case stands upon the bill of lading.

The tow-boat and her barges, after taking on additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, 819 miles below Pittsburgh, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge

"Ironsides, No. 3," which was but partly loaded, and proceeded with it up stream to these piles. After loading this corn the boat crossed the river with the barge and took on corn which was offered at two landings on the Kentucky side, viz., New York landing, about three miles above the wharf-boat, and Whitmon's landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while rounding out in the river the barge suddenly took water and soon sunk, becoming a total wreck, the cargo, including libellant's goods, sustaining great damage. This occurred late in the evening of December 18, 1874. The protest signed by the officers and some of the crew and executed December 23, 1874, assigns as the cause of the disaster that the boat struck some unseen obstruction. Immediate notice by telegram of the sinking of the barge with their goods was given the libellants.

The libellants brought no suit until March 4, 1880, when they filed the libel in this case against the surviving owner and the executors of a deceased owner of the tow-boat and barges, *in personam*.

The original libel set forth that the barge "struck some unseen obstruction, as the libellants are informed and believe," and the only ground of liability therein alleged is, that of wrongful deviation in returning up stream to New York landing after safe arrival at Mt. Vernon.

In their answer the respondents denied that their course of action complained of was a deviation, and averred that was lawful, customary and right and in accordance with the established usage of the trade in which they were plying. After this answer was filed the libellants on March 31, 1880, filed an amended libel in which they allege that since the filing of their original libel they had been informed and believe that the sinking of the barge was not the result of an obstruction in the river but was caused by reason of the "barge being overloaded on the port side with sacks of corn," the undue haste with which the barge was loaded and the negligent and improper stowage of the corn thereon.

The case, therefore, as it now stands presents for solution two main questions: *First*—Was there a deviation? *Second*—If not, was the sinking of the barge the result of one of "the dangers of navigation" and an "unavoidable accident" within the exception in the bill of lading, or was it caused by reason of the negligence charged in the amended libel?

- (1.) A deviation is a voluntary departure,

without necessity or reasonable cause, from the regular and usual course of the voyage: *Coffin v. Newburgport Marine Ins. Co.*, 9 Mass., 447. It is, however, no deviation to touch and stay at a port out of the course of the voyage, if such departure is within the usage of the trade: *Bentaloe v. Pratt*, Wal. C. C. Rep., 58; *Bulkley v. Protection Ins. Co.*, 2 Paine C. C. Rep., 82; *Thatcher v. McCulloh*, Olcott's Ad. R., 365; *Oli-ver v. Maryland Ins. Co.*, 7 Cr., 489, 491. Where a bill of lading provides that the goods are to be carried from one port to another, a direct voyage is *prima facie* intended, but this may be controlled by usage. Thus where the bill of lading stipulated that the goods were to be transported from New York to Georgetown in the District of Columbia, it was held that the vessel was justified by the usage of the trade in going to Norfolk to discharge freight although it was thirty miles out of the direct course to Georgetown: *Lowry v. Russell*, 8 Pick., 360. So it was held in *Columbian Ins. Co. v. Catlett*, 12 Wheat., 383, 387, 388, that the true meaning of the policy there in suit was to be sought in an exposition of the words, with reference to the known course and usage of the West India trade; and that what delay at St. Thomas would constitute a deviation depended on the nature of the voyage and the usage of the trade. After the explicit provisions of the contract, usage is the predominating test as to the deviation: Phillips on Insurance, Sec. 980. And usage is the test of what belongs to the voyage and the proper course in prosecuting it: *Ibid.*, Sec. 1003. Established usages relating to a voyage are impliedly made part of the contract if nothing is expressed to the contrary: *Gracie v. Marine Ins. Co.*, 8 Cr., 75; *Columbian Ins. Co. v. Catlett*, *supra*; *Robinson v. United States*, 13 Wal., 366; Phillips on Insurance, Sec. 997.

These being recognized legal principles, our next inquiry is how far are they applicable to this case? Numerous witnesses variously connected with the river trade and having large experience, testify of their own personal knowledge, that it has been the general usage since the commencement of the business of transporting merchandise on the western rivers in barges towed by steam vessels, and constantly practiced, for such barges to take on additional cargo along the rivers *en route* to the port of destination, and in so doing for the owners or agents of such vessels and barges to land and tie up their tows at the more public, or larger and safer landings, and detach from the fleets a barge or barges and tow the same to the places in the vicinity, whether up, across or down the stream, where cargo is awaiting shipment; and

it is testified that such usage has thus prevailed at Mt. Vernon, Indiana, in respect to goods awaiting shipment at New York landing and other neighboring points.

For example: Arthur J. Branch, the Superintendent of the Evansville and New Orleans Barge Company, having testified to his connection with the Ohio river trade for twenty years and his acquaintance with its usages, was asked this question: Q.—“Suppose a steam-boat with several barges in tow were to land at a port on the Ohio river and there find or ascertain that there was freight for her at three or four different landings, within four or five miles above said port, which she passed in coming down, what has been the custom with respect to taking such freight?” To which he replied: A.—“It has been to leave the tow in the safest and most convenient landing and take one or two barges, as might be necessary, and go back. If we know when we pass the freight that we are to take it, we go below to the nearest and safest harbor for our tow, and to save time and expense. It would not be good navigation to land with our whole tow at each landing for freight and in many cases it would be impossible to do so.” Wm. A. Page testifies: “Where there are several landings to make in the same neighborhood it is almost the invariable custom to tie up the tow and then go back with one barge for the freight. Wherever I have been, and all along the Ohio as far as my knowledge goes, this is the custom, and it is good sound steam-boat sense everywhere. This is the custom in the neighborhood of Mt. Vernon.” Henry H. Sholes says: “I have known that custom to exist twenty years—ever since I have been tow-boating. It has existed to my knowledge in the trade between Pittsburgh and New Orleans. It has been a general custom.” John B. Hall, a wharf-boatman at Evansville, Indiana, speaking of the practice there, says: “A tow-boat coming down the river with four or five model barges, and having several landings to make close together above, would leave the bulk of the tow and go back up the river with the barge which was to receive the freight. This custom has prevailed all along the lower Ohio river since I have had anything to do with the river and before I went into business. The custom at Mt. Vernon has been the same as here.” George G. Grammer, the Superintendent of the Evansville, Cairo and Memphis Packet Company, testifies that at Evansville, Mt. Vernon and Shawneetown there are wharf-boats, and that it is an old custom for the farmers in the vicinity thereof to make contracts there for shipping their corn from their farm landings, and that it

has been the common practice for tow-boats descending the Ohio to land at these wharf-boats and make fast the tow and take one of the barges out of the fleet and to the corn freight piles. And he adds: "I regard it the safest for all interests concerned to select some good landing in the vicinity of these freight piles, either above or below, or at them for that matter, and detach the particular barge they desire to load and move it separately to the freight piles. That would be safer because a steam-boat can handle one barge better than she can handle more than one. And very often the freight is in a shoal or ragged landing and she can get there with one barge when she could not get there with more. That would be a much more speedy way of loading and more convenient. This is the custom at Mt. Vernon and other points on the Ohio river for loading barges." Enoch E. Thomas, who has been one of the proprietors of the Mt. Vernon wharf-boat for twenty-five years, testifies: "The boats generally come here with their barges, and when told of corn above here to be shipped, they go back for the corn. This has been the general custom here. The corn above Mt. Vernon is, as a rule, owned by parties living here who make their shipping contracts with the boats on their arrival at this port. This custom has been observed by boats with barges partly loaded bound from Pittsburgh to New Orleans. This has been the custom ever since I have been on the river. Our shipments cover the river from Long's landing to the mouth of the Wabash. Long's landing is six miles above Mt. Vernon." Similar questions, from the testimony of the respondents' other witnesses, might be greatly multiplied were it deemed necessary.

The witnesses assign several reasons for the usage. The barges they testify can be more conveniently and economically handled and loaded singly than when together in the tow. A saving of time is also effected as several barges can be loaded at different points simultaneously, a matter of much importance in a river like the Ohio, which is subject to sudden rises and rapidly falls. But the main reason is that the usage conduces to the safety of the whole fleet and thus operates to the advantage of every party in interest. Upon this point the witnesses are very emphatic. Where freight is to be taken on at several points in the vicinity of such a good landing as that at Mt. Vernon, they testify that it is much the safer course to land and leave the tow there and go back with a single barge, than to land the entire fleet at the different points. To appreciate how heavy, and hard to handle, a tow of three or

more barges is, we need but to recur to the official survey of the barge "Ironsides, No. 3." Her Custom-House tonnage was 369, her carrying capacity 700 tons, length 180 feet, breadth 31 feet, depth 7 feet.

It is shown that there is a further and special reason for the usage at Mt. Vernon. Ninety *per cent.* of the shipments in that vicinity consists of corn in sacks at different farm landings which can be reached by a single barge when it is often impossible to land the whole tow. The only reasonably practicable way the farmers have to get their corn to market is by barges brought to their private landings. To haul the grain to the wharf-boat at Mt. Vernon would cost as much as the freight charges to New Orleans.

To disprove the alleged usage the libellants examined a large number of witnesses. Their testimony, however, is principally of a negative character. They say they do not know of any such usage, but with rare exceptions they expressly disclaim familiarity with the usages of the trade. They are simply ignorant upon the subject and confess their ignorance. Thus, the following is found in the cross-examination of Charles A. Ault, a witness for the libellants: Q.—"Do you pretend to be at all familiar with the customs of navigation with respect to steam-boats or barges receiving and discharging freight between their terminal points?" A.—"I do not." Q.—"Such a custom then as you have been asked about might exist without your knowing anything about it, might it not?" A.—"Yes, sir; it might exist without my knowing anything about it." And so, F. A. Bacon, being cross-examined as to the alleged usage at Evansville and Mt. Vernon, in respect to corn shipments, answered: "I know nothing about that matter." * * * "That may have been the universal custom without my knowledge." Upon a careful scrutiny of the evidence it will be found that the admitted want of knowledge touching the barge trade on the part of the libellants' witnesses generally is such, as to deprive their testimony of force. Several of the libellants' witnesses, however, state that they have knowledge or information that the usage in question is pursued by barges towed by steam vessels. The evidence submitted by the respondents in proof of the usage is positive, clear and convincing, and, in my judgment, is not weakened, nor is any doubt respecting it created, by the testimony on the part of the libellants.

The court, therefore, finds: **FIRST**—That it has been the general usage in the Pittsburgh and New Orleans barge trade coeval with the commencement of the business and constantly

practiced, where cargo is to be taken on *en route* to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo and tow the same to the several points where the cargo may be stored, whether up or down stream, or across the river. SECOND—That at the time of the sinking of the barge "Ironsides, No. 3," it was the general and established usage for barges towed by steam vessels in the Pitts- and New Orleans trade, having cargo to receive at New York landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the "Iron Mountain," on the occasion in question, was in conformity with such usage of the trade. THIRD—That the usage so practiced at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business and conduces to the safety of the whole tow; and is, therefore, a reasonable usage.

Applying then to these facts the legal principles already discussed, I am of opinion that there was no deviation. When the barge "Ironsides, No. 3," was detached from the tow and taken to the several landings on the Indiana and Kentucky shores, it was to get cargo, a purpose connected with the voyage. The "Iron Mountain" was never beyond sight of her tow, and commercially considered, kept within the port of Mt. Vernon, according to the testimony of George W. Thomas. The expert testimony clearly shows that in landing at Mt. Vernon and there leaving the bulk of her tow and taking back a single barge for cargo, her course was prudent and proper.

(2.) The contemporaneous declaration in the protest as to the cause of the sinking of the barge remained unchallenged for a period of five years and three months; and the original libel verified by affidavit ascribed the loss to the same cause. That it was not filed without an investigation of the facts may well be assumed. Indeed the statements of the libel plainly imply that the libellants were then possessed of information as to "all the particulars of the sinking of the barge." Death had removed S. L. Summers, the mate under whose immediate supervision the corn was loaded and stowed on the barge, and whose testimony was of the last importance. These things are to be borne in mind when we enter upon the inquiry as to the truth of the specific charge of negligence, first

made in the amended libel, that the barge sunk by reason of improper loading and stowage.

To sustain this charge the libellants examined eight deck-hands, viz., Krumm, Riley, John and James H. Dunn, Martin, Leonard, Starke and Tolen, and Anderson, a stevedore. Anderson says the barge listed at New York landing, and, indeed, was not trim when she went up. Herein, however, he is contradicted by Martin, who testifies the barge was all right at New York landing and when she left there. The opinion Anderson undertakes to express as to the cause of the sinking, I regard as entirely worthless. He did not see her sink, and left her at New York landing. I do not understand him to have been at Whitmon's at all. He admits he has had no experience with barges.

Nothing in the testimony of Krumm or Tolen tends to show that the barge was overloaded on the larboard side or the corn improperly stowed. On the contrary the testimony of both these witnesses, I think, strongly disproves the allegations of the amended libel. Krumm says: "When we carried the corn on the barge, I think we carried the corn as much on the one side as the other." He also states it was when the barge got out into the river "she capsized a little on one side" and not when she commenced to back out, and that she did not careen enough to take water over her deck. The testimony of this witness throughout, in my judgment, tends to show that the cause of the sinking was as claimed by the respondents. Tolen testifies: "We stowed the corn in piles along the sides of the boat and midships, at both places. We put as much on one side as the other, as far as my knowledge goes." He further states—in this contradicting other of the libellants' witnesses—that all the corn was stowed away except "a few sacks, probably a hundred." In his examination in chief he states: "As she was backing out she hit a snag or sprung a leak, I could not say which. We put a syphon in her and started to put another syphon in her, and before we got it done she was sunk." He says she was a good barge and there was nothing wrong with her, so far as he knew. On cross-examination he was asked: "Could she have sunk in so short a time by reason of any ordinary leak not caused by striking some object?" To which he replied: "Not to the best of my knowledge; she would not have sunk without having struck a snag or having sprung more than an ordinary leak." And he significantly added: "There was nothing to cause her to spring more than an ordinary leak unless she struck something. She must had a very big hole in her bottom to have sunk in that short time." This, be it re-

membered, comes from the libellants' own witness. His testimony has peculiar value as that of one who has had a steam-boat experience of fifteen years and is by occupation a sailor. I think no one after reading this man's testimony can accept the theory of the loss upon which the libellants now insist.

At least two of the other six deck-hands who testified in behalf of the libellants were without experience on the river. The individual stories of several of these witnesses are confused and lack coherency. They differ among themselves as to important particulars, and in some very essential matters their testimony is conflicting. For example: Starke and James H. Dunn say the corn taken on at New York landing and Whitmon's was not stowed at all. On the other hand, Martin says the corn taken on at both places was stowed as received, and he describes minutely in what manner. Again, James H. Dunn testifies: "The water that sunk the barge came over her side and from there ran into her hold." On the contrary, Leonard testifies: "I rather think the water that sunk her came in from the bottom as there was water on the dunnage when we went down to move the freight. There was half an inch or so of water on the dunnage at that time. * * * She took water very rapidly after I got out of the hold, as she sunk in three minutes after."

Five of these witnesses express the opinion that the barge sunk on account of improper loading, but they hardly agree as to what the precise negligence was. This accident, it must be observed, happened after nightfall and suddenly. It is quite plain these witnesses at the time were greatly excited. Called upon to testify nearly six years after the occurrence, their opinions are to be received with allowance. They are probably honest in their opinions, but, after a very careful consideration of the whole evidence, I am persuaded they are mistaken.

It clearly appears the barge was not overloaded. Indeed she was not nearly loaded up to her full capacity. She was well built, strong, staunch and in perfect order. The mate who superintended her loading on this occasion—now unfortunately dead—is spoken of by the witnesses as a competent and trust-worthy officer. The respondents examined William C. Gray, the captain of the tow-boat, Henry H. Sholes, the receiving clerk, and Joseph H. Dunlap, the agent of the "Iron Mountain" barge line. These witnesses have had long experience on the river, are intelligent and disinterested, and I have no reason to doubt the truth of their statements of fact. They severally testify that the barge was loaded in the usual manner and

properly, and that the corn, save a few sacks, not exceeding a hundred, was regularly stowed away before they left Whitmon's and the barge was then trim. Sholes and Dunlap testify that they went into the cabin of the tow-boat and sat down at a table to figure up the quantity of corn taken aboard. While thus engaged they felt a jar or shock as though the boat had struck something. Captain Gray, who was then on the deck of the tow-boat, says "the barge made a sudden crushing lurch," and again he describes the shock as a "concussion, blow or crush." Dunlap and Sholes hastened out and heard some of the men say the barge had struck something and was taking water. Both went on the barge and Dunlap into the hold. They found she was taking water in her hold rapidly. No water was coming over the deck. Sholes says he heard the water "rushing into the hold." A syphon pump was put into the hold and set to work. Captain Gray states that after the concussion the barge righted temporarily and for probably five or six minutes there was nothing unusual in her shape. He went into the hold and heard the water coming in below the dunnage and back of the wing tiers of the stowage. He says he "heard it rush behind the cargo." Efforts were made to get at the break by removing the cargo, but before this could be accomplished the water came over her dunnage and caused the barge to list badly and the men were ordered out of the hold, the peril becoming so great. It is needless to prolong this opinion by further citations from the proofs. Suffice it to say, I am satisfied from the whole evidence the sinking of the barge occurred by reason of the cause alleged by the respondents.

The court finds: **FOURTH**—That while the steam tow-boat "Iron Mountain," with the barge "Ironsides, No. 3," in tow, was backing out from Whitmon's landing, and when out in the river, the barge struck some unmarked, unknown and hidden object below the surface of the water which caused her to take water and sink, and this without negligence on the part of the tow-boat, or on the part of the owners of the tow-boat and barge, their agents or servants; and that it was an unavoidable accident.

That a loss so occurring is within the exception in the bill of lading is quite clear: *Transportation Company v. Downer*, 11 Wal., 129; *The Favorite*, 2 Bissell, 502; *Williams v. Grant*, 1 Conn., 487.

Let a decree be drawn dismissing the libel with costs.

For libellants, *Messrs. A. H. Clarke and S. A. Will.*

For respondents, *Messrs. Knox & Reed.*

Orphans' Court.

In Re Estate of JOHN MOORHEAD, Deceased.

Where an account embracing personal estate has been regularly filed in the Register's office, and advertised, and distribution has been made by the Orphans' Court in due course on audit, the distributees cannot be compelled to give refunding bonds for the "shares" appropriated to them respectively.

This cause was heard upon the petition of the executors of the last will of John Moorhead, deceased, and demurrer filed thereto by distributees. The petition set forth testator's death in September, 1880, possessed of personal estate amounting to \$1,121,009.66, and of real estate exceeding in value \$200,000, and the devise of his estate after a provision for his widow, in equal shares among his children; that the executor's account, confirmed December 16, 1881, showed balance in their hands of \$1,140,453.76, upon which a decree of distribution was made, December 31, 1881, distributing the said balance to and among the said widow and children in accordance with the said will. The petition further represented that all the indebtedness and liabilities of said John Moorhead had been paid so far as was known to the executors after diligent inquiry and investigation, and that petitioners were advised that before payment could lawfully be made to distributees under said decree of distribution, refunding bonds should be given in accordance with the provisions of the Act of 24th February, 1834, and prayer was made that the court would direct the sum and form of such refunding bonds and whether real or personal security should be given, and to what amount in each case, etc.

For executors, *Malcolm Hay, Esq.*

Opinion by HAWKINS, P. J. Filed February 25, 1882.

The executors of the will of John Moorhead, deceased, having filed an account with the register, which, in due course, was audited and a decree of distribution of the "surplusage of the estate" embraced therein, consisting entirely of personalty, was made, the question is now raised whether the distributees can be required to give refunding bonds for the shares so appropriated to them? That they cannot will be seen by an examination of the various Acts of Assembly relating to distribution in the Orphans' Court, in connection with the authorities giving construction thereto.

There are three modes of distribution of the "surplusage" of the estates of decedents recognized by law:

(1.) On presentation "to the Orphans' Court" of "a statement of all demands which have been made known to him," against his decedent, the administrator will be authorized to "make distribution of the *residue*" remaining "after deducting the amount" of such demands *among the next of kin*; but before any person shall be entitled to receive his "share" in said distribution he shall give refunding bond for a proportionate part of debts thereafter recovered: Act 24th February, 1834, §§ 39, 40, 41 and 47, *Purd. Dig.*, p. 447, pl. 205, *et seq.*

(2.) Distribution may be made by administrators at their own risk without application to the Orphans' Court: Section 58, Act 24th February, 1834; and,

(3.) Distribution may be made through auditors: Act 29th March, 1832, § 19, *Purd. Dig.*, p. 445, pl. 198; Act 13th April, 1840, § 1, *Purd. Dig.*, p. 446, pl. 200.

(1.) The Legislature manifestly had two objects in view in passing the 39, 40, 41 and 47, Sections of the Act of 1834: (1) To provide a mode of distribution amongst *next of kin*, in anticipation of the time of distribution amongst creditors of decedents, and (2) to provide for the security of these creditors in the meantime.

The administrator is authorized to "make distribution," under the direction of the Orphans' Court, of the *residue* of the estate remaining "after deducting the amount" "of all demands which have been made known to him." No provision is made in this act for the presentation or payment of these "demands." "The amount thereof" is simply directed by the terms of the act to be deducted from the assets in the hands of the administrator in order to ascertain the "residue" of which the administrator is "to make distribution, under the direction of the Orphans' Court." The "statement" required by the act need not be filed as a settled account in the Register's office. It need only be presented "to the Orphans' Court:" *Commonwealth v. Snyder*, 62 Pa. St., 153. The act does not contemplate notice to creditors.

Hence the necessity for refunding bonds in such cases.

The present account was not filed under this act. No "person interested" required the executors to "present to the Orphans' Court a statement" as provided therein.

(2.) Voluntary distribution under the 58th Section of the Act of 1834, may be passed without remark, as having no application here.

(3.) The 19th Section of the Act of 29th March, 1832, made it the duty of the Orphans' Court to appoint auditors "to settle and adjust the rates and proportions of the assets to and among the

respective *creditors*" in insolvent estates; and the 1st Section of the Act of 13th April, 1840, extended this provision, as respects distribution through auditors to solvent estates "to and among the persons entitled to the same:" *Bull's Appeal*, 24 Pa. St., 286. "It is clear from these statutory provisions that the Orphans' Court is clothed with authority to distribute estates of decedents in the hands of executors and administrators among the persons entitled to the same, and that by these general terms as well as by express words, the Legislature embraces 'creditors,' as well as 'heirs,' next of kin and 'legatees;'" *Kitteras' Appeal*, 17 Pa. St., 422. If the court has jurisdiction to make distribution among all persons interested, they must be presumed to be in court: *App v. Driesback*, 2 R., 287, or to waive their claim on the fund for distribution: *Hammett's Appeal*, 83 Pa. St., 392, and are concluded by the decree of distribution. There can then be no necessity for refunding bonds in such cases, and accordingly they are not mentioned either in the Act of 1832 or that of 1840, in connection with the distribution of personal estate.

The distribution in this case was made under these acts and therefore no refunding bonds are required.

The opinion in *Jones' Appeal*, 29 PITTSBURGH LEGAL JOURNAL, 195, is supposed to have some bearing on the question raised here. There was no audit on the account in that case and the decision of the Supreme Court must be presumed to have been made in that view.

And now, to wit, February 25, 1882, this matter came on to be heard upon petition and demurrer, and was argued by counsel and thereupon, upon consideration thereof, the court being of opinion that no refunding bonds are required, sustain the demurrer and dismiss the petition and direct that the petitioners forthwith carry into effect the decree of distribution heretofore made without requiring refunding bonds from the distributees. Per Curiam.

[See also, *Clark's Estate*, 1 Luz. Leg. Reg., 32.]

NEW BOOKS.

AMERICAN CRIMINAL REPORTS. A series designed to contain the latest and most important Criminal Cases determined in the Federal and State Courts in the United States as well as selected cases important to American lawyers, from the English, Irish, Scotch and Canadian Law Reports with notes and references. By JOHN G. HAWLEY, late Prosecuting Attorney at Detroit. Volume III. Chicago: CALLAGHAN & Co. 1881.

This volume contains many interesting cases not otherwise to be found except in large libraries. Among them are: *The Queen v. Brad-*

laugh (Obscene Publication); *Bradlaugh v. The Queen* (Criminal Pleading); *The Queen v. Rogers* (Embezzlement—Venue); *Strauder v. West Virginia* (Const. Law—Removal of causes into Federal Courts); *Virginia v. Rives*, (Neglect to summon colored men as jurors); *Ex parte Virginia* (Jurisdiction of Supreme Court of the United States to award *Habeas Corpus*).

The series would be of greater value if more of the cases were annotated.

LUZERNE LEGAL REGISTER REPORTS, containing cases decided in the Supreme Court of Pennsylvania, and in the Court of Common Pleas, Orphans' Court and Court of Quarter Sessions of the county of Luzerne, and in the Courts of the Second, Fifth, Eighth, Twelfth, Fifteenth, Nineteenth, Twenty-first, Twenty-sixth, Thirty-first, Thirty-second, Forty-third, Forty-fourth and Forty-fifth Judicial Districts of the State of Pennsylvania. Originally reported in the *Luzerne Legal Register*. Edited by GEORGE B. KULP, of the Luzerne County Bar. Volume I. Pages 556. Price, \$5.00. Philadelphia: REES WELSH & Co. 1882.

This elegantly printed volume is made up of cases that have appeared in the *Register*. They cover a wide range of subjects, and many of the Common Pleas cases of considerable interest and importance, standing unappealed from, make precedents of value. The *Register* is an excellent publication and its reports are worthy of preservation.

—*The Criminal Law Magazine* for March has a long editorial article on "Departures from the Common Law Rule as to Testimony by Husband and Wife." It also contains a report of the case of *McCarthy v. DeArmit*.

—*The Federal Reporter* for February 28, 1882, contains a full report of the charge of Judge Cox in the Guiteau case, with interesting and valuable notes by Francis Wharton and Robert Desty. Many of the cases appearing in the *Reporter* are excellently annotated, thereby greatly enhancing their value as references.

—We have received from Weed, Parsons & Co., Albany, N. Y., the first number of the *Index Reporter*, edited by Robert R. Newell, Esq., of the Boston Bar. The publishers announce that the purpose of the publication is to collect and arrange all contemporary decisions as fast as they appear; that each case decided in the several courts of last resort will first appear with a reference to the journal or journals first publishing it, and afterwards with its proper and permanent citation by volume and page of the authorized reports. It will be published monthly at \$5.00 per year. If the work is conscientiously done the publication will be of great assistance in making briefs.

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PITTSBURGH, PA., MARCH 29, 1882.

Supreme Court, Penn'a.

C. A. HUSTON v. TICKNOR & CO.

In a feigned issue, the party holding the affirmative of the issue should be made the plaintiff.

The burden of proof is on the party holding the affirmative of the issue; and the form of the issue cannot change this rule and shift the burden.

Semble, that ordinarily where an issue is improperly framed and no exception to the form is taken in the court below, the court of error will not review the action of the court below in framing the issue; but where the consequence of the improper form of the issue is an infringement of a rule of evidence and a deprivation of right then it is the duty of the court of error to consider the form of the issue, and to see that justice be done.

A subscribing witness is, either (1) one, who being present at the execution of the instrument, at that time, and at the request of the party, attaches his signature to it; or, (2) one, who, though not present at the execution of the instrument, yet subsequently in the presence of the party, who acknowledging the signature, requests him to sign, affixes his signature to it. But one, though present at the execution of the instrument, and a witness of the signature, does not become a subscribing witness by subsequently affixing his signature to it, of his own motion, and in the absence of and without request on the part of the party.

Error to the Court of Common Pleas of Crawford county.

Feigned issue, to try the question whether the lien of certain judgments against one McMurtry held by Miss C. A. Huston was postponed to the lien of certain other judgments against the same defendant owned by Messrs. Ticknor & Co. The form of the issue was as follows:

"And now, to wit, February 28, 1881, it is ordered that a feigned issue be formed, in which C. A. Huston shall be plaintiff and Ticknor & Co. shall be defendants. The following questions are to be determined in and by said issue.

"Second. Whether or not a certain paper writing filed or recorded in Nos. 563, 564, 565, 566, August Term, 1876, purporting to be a postponement of the lien of said judgments to the lien of certain judgments held by Ticknor & Co., against W. T. McMurtry, at Nos. 424, 425, 426, 427, 428, 429, 430, 431, of April Term, 1872, is the act and deed of said C. A. Huston."

On the trial, before CHURCH, J., the plaintiff, Miss C. A. Huston, was called, and the paper in dispute being shown to her, she denied ever having signed it or ever having authorized anybody to sign it for her. The plaintiff then rested.

The defendants then offered in evidence the paper in dispute purporting to be a postponement of the liens of Miss Huston to liens of Ticknor

& Co.'s judgments. Objected to, on the ground that the execution of the paper must first be proved by defendants.

By the court. They do not have to, it is the very matter in dispute; you introduced it in evidence the very first thing; it is in evidence practically and substantially, and you may read it if you like; you could not go a step without it; this verdict would have to be for the defendant, if that paper was not in evidence; it does not need to be proven; it is in dispute. Objection overruled; exception. (Third assignment of error.)

The plaintiff presented, *inter alia*, the following points: (1) That the plaintiff having sworn that she never signed the paper in question, called a postponement, the defendants must satisfy the jury by a preponderance of testimony, that she did sign and execute the said paper; or the verdict should be for the plaintiff. *Answer*.—The burden of proof in the case is on the plaintiff, and if this point means that the burden is on the defendant it is declined. (Fifteenth assignment of error.)

(4) That if the jury believe the testimony of Ticknor and Litchfield, that W. T. McMurtry signed the paper called a postponement in their office, saying that he had seen Miss Huston sign the same, Miss Huston not being present, he is not a subscribing witness to the paper, and proof of the genuineness of his signature is not evidence of the execution of the said paper by Miss Huston. *Answer*.—McMurtry is a subscribing witness if he signed the paper in question, and proof of his signature is a part of the common law proof of the execution of the paper. (Sixteenth assignment of error.)

The court further charged the jury: "The plaintiff in this case is C. A. Huston, and she alleges it is not her signature, and the burden of proof is upon her to show that it is not her signature. She is the actor in this suit, and the burden of proof is upon her." (Ninth assignment of error.)

Verdict and judgment for defendants.

The plaintiff took this writ, assigning as error, *inter alia*, the answers to points and the portion of the charge of the court above quoted.

For plaintiff in error, Messrs. Thomas Roddy and Humes & Frey.

Contra, Messrs. D. C. McCoy & Son and W. R. Bole.

Opinion by PAXSON, J. Filed January 3, 1882.

This was a feigned issue, and a number of assignments of error have been filed to the rulings of the learned judge below.

The first criticism we have to make is to the form of the issue. It was framed to try the single question whether a paper postponing the lien of certain judgments held by the plaintiff to the lien of certain other judgments held by the defendants was the act and deed of the said plaintiff. The latter denied having executed such a paper, and the issue was accordingly framed to try this question of fact. In framing such an issue the party holding the affirmative should be made the plaintiff. This, however, was not done. On the contrary, the party denying the execution of the paper was made the plaintiff, and the parties asserting it were made defendants. No exception was taken to the form of the issue, and we would not, therefore, reverse on that ground. But the consequences resulting from this error are so serious and so interwoven with the entire trial that our duty requires us to consider them.

Had the parties been reversed the orderly mode of trial would have been for the plaintiffs to have called the subscribing witnesses, and after having in the usual manner proved the execution of the paper, offered it in evidence. This would have made out a *prima facie* case, and it would then have been for the defendant, who denied its execution, to have sustained such denial by testimony.

What actually occurred upon the trial was this: After the plaintiff's case was opened, she went upon the stand and positively denied having executed the paper or having authorized any one to execute it for her. At this point the plaintiff rested her case.

The defendants then offered the paper in dispute in evidence. Neither the subscribing witnesses, nor any witnesses were called to prove plaintiff's signature. The paper was admitted by the court against the objection of plaintiff. The result was the admission of a paper which had not been proved, and the execution of which had been denied by the plaintiff, who, up to this point, was the only witness who had been sworn in the court. This error was cured in part by the defendants subsequently calling one of the subscribing witnesses, and it is referred to now chiefly as showing the incongruous results flowing from the original error in the form of the issue. This will further appear by reference to the third assignment of error. In reply to the objection of plaintiff's counsel, that the signature to the paper had not been proved, the court replied: "They do not have to. The very matter in dispute, you introduced it in evidence the first thing. It is in evidence practically and substantially, and you may read it if you like. You could not go a step without it. This

verdict would have to be for the defendants if that paper was not in evidence. It does not need to be proven. It is in dispute." We are entirely unable to see how a paper that is in dispute requires no proof, nor how a refusal of the court to admit the paper without proof would entitle the defendants to a verdict. In *Harrington v. Gable*, 31 P. F. S., 406, which was a feigned issue to try the execution of a judgment note, the plaintiff offered the note in evidence without proof of its execution. The court below rejected it, which ruling was affirmed by this court, *WOODWARD, J.*, saying: "The offer of the note and of the record of the judgment at the opening of the cause was premature, and was properly rejected." It is true, in the case cited, the issue was properly found, the plaintiff being the party holding the affirmative of the issue. This, however, we think is not material for reasons which will be stated hereafter.

The most serious result, however, consequent upon the form of the issue, was the shifting of the burden of proof. This is a radical error and underlies the entire case. The learned court instructed the jury: "Gentlemen: The plaintiff in this case is C. A. Huston, and she alleges it is not her signature, and the burden of proof is upon her to show that it is not her signature. She is the actor in this suit, and the burden of proof is upon her."

The learned judge was evidently misled by the form of the issue. This leads us to consider the question how far the plaintiff, having submitted to be placed in the front of the battle, without an exception, can now take advantage of the ruling of the court upon this point.

The general rule of law is that the burden of proof lies upon the party who substantially asserts the affirmative of the issue. "And regard is had in this matter to the substance and effect of the issue, rather than to the form of it:" *Greenleaf on Evidence*, § 74. The *narr.* in this case is in the usual form of a wager. It is true C. A. Huston is the actor, and this makes the whole thing excessively awkward. Regarding, however, the substance, we find on her part nothing but a denial of what the defendants had previously asserted, to wit, that the paper in question was her act and deed. She was, therefore, merely asserting a negative, and under no rule of law was the burden of proof upon her. The order of court or arrangement by which she was made the plaintiff might perhaps control the order of proceedings, but it could not abrogate well-established rules of evidence and deprive her of the legal presumption, to which she was entitled. The 9th and 15th assignments are sustained.

There was also error in the answer of the court to the plaintiff's fourth point. The said point is as follows: "That if the jury believe the testimony of Ticknor & Litchfield, that W. T. McMurtry signed a paper called a postponement in their office, saying that he had seen Miss Huston sign the same, Miss Huston not being present, he is not a subscribing witness to the paper, and proof of the genuineness of his signature is not evidence of the execution of said paper by Miss Huston." Which point the learned judge answered, by saying: "McMurtry is a subscribing witness if he signed the paper in question, and proof of his signature is a part of the common law proof of the execution of the paper."

The paper referred to bore upon its face the name of W. T. McMurtry as a subscribing witness. *Prima facie*, therefore, he was such. The defendants, however, did not call him to sustain the paper. It was shown by the testimony of each of the defendants that McMurtry brought them the paper purporting to be signed by Miss Huston, and by D. F. Booth as a subscribing witness; that he stated he had seen them both sign, and then in the absence of Miss Huston, appended his own name as a subscribing witness, remarking at the time that "two witnesses were better than one." The plaintiff in rebuttal called Mr. McMurtry, who flatly denied his signature to the paper, after which the defendants called several witnesses to prove that it was his signature.

It is plain from the defendants' own showing that McMurtry was not a subscribing witness. He did not sign as such in the presence of Miss Huston nor at her request. The familiar rule upon this subject is accurately stated by Mr. Greenleaf in his work on Evidence, at Section 569: "A subscribing witness is one who was present when the instrument was executed, and who, at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation, neither is it such, if, though present at the execution, he did not subscribe the instrument at that time, but did it afterwards and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should have actually seen the party sign, nor have been present at the very moment of signing; for, if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation." The rule is laid down in a similar manner in Bouvier's

Law Dictionary, Vol., II, p. 555.

In view of the foregoing state of facts it was error for the court to instruct the jury as a matter of law that McMurtry was a subscribing witness to the paper, and that proof of his signature was proof of its execution. It was the more hurtful, as the effect of such proof, under the ruling of the court, was to contradict the plaintiff's statement that the signature was not hers.

This disposes of all the serious errors in the case. Complaint is made of the charge in several of the assignments, particularly of inaccuracies as to the statement of the facts. As it is manifest that only a portion of the testimony is printed, we will not attempt a review of those portions of the charge, feeling confident if any such errors exist the learned judge will correct them upon another trial.

Judgment reversed and a venire facias de novo awarded.

J. J. FREEMAN and PAMELIA, His Wife, in Right of Said Wife, Plaintiffs Below, v. ANDREW G. APPLE et al.

Under an execution issued against A., a levy was made by the sheriff on personal property of A.'s wife, and the sheriff, subsequently going out of office, transferred the writ to his successor, who sold the property, notwithstanding a notice that it belonged to the wife. It was purchased by B., who leased it to A. at \$10 per annum. In an action of trespass brought, in right of the wife, against the sheriff and his deputy, *held*,

- (1.) That the fact that the levy was made by the predecessor in office of the defendant, furnished no justification or excuse for enforcing the levy and selling the property of the wife, after notice of her title.
 - (2.) That the wife's right of action against the sheriff for illegally advertising and selling her property could not be defeated by the act of husband in recognizing the right of the purchaser at sheriff's sale and agreeing to pay him a stipulated sum for the use of the property.
- The sheriff returned "that after having given due and legal notice he did, on * * * sell the property," etc. *Held*, that the return was conclusive on him, and neither manual taking, occupation or removal was essential to render him liable to the beneficial plaintiff.

Error to the Court of Common Pleas of Crawford county.

On an execution issued on a judgment obtained against J. J. Freeman, one of the plaintiffs in error and below, the sheriff (Ryan) levied on property belonging to Pamela Freeman, the wife, and subsequently turned the writ over to his successor in office, Apple, one of the defendants. Apple deputed L. H. Long, another defendant, to execute the writ, and the property was sold to one Slocum. He leased it to J. J. Freeman at \$10 per year. It was undisputed that the sheriff had notice of the claim of Mrs. Freeman to the property and that she was act-

ually the owner of it. She then brought this action of trespass against Apple and Long.

The court was asked to charge: "That if they find that the property in question belonged to Mrs. Freeman at the time of the sheriff's sale, and that the sheriff sold the same to S. Slocum at said sale, and that said Slocum purchased said property on his own account and now owns the same, the sheriff is liable in trespass for the property sold by him," which point was refused. (First assignment of error.)

Also, "2d. That if the jury finds that the purchaser at sheriff's sale leased the property to the defendant in the execution and left the goods on the premises, this will not defeat the right of the plaintiff to recover in this suit," which point was refused. (Second assignment of error.)

The court charged: "The right to the occupancy and enjoyment of this property has not been interfered with by the sheriff, and was not so interfered with at the time of bringing this suit, and your verdict will be for the defendant." (Fourth assignment of error.)

For plaintiffs in error and below, *Messrs. W. R. Bole and Dorrance & Hallock.*

Contra, Messrs. H. L. Richmond, Jr., and John J. Henderson.

Opinion by STERRETT, J. Filed January 2, 1882.

In taking the case from the jury and directing a verdict for the defendants, the court below virtually ruled that the sheriff was not liable in trespass for advertising and selling the separate personal property of the beneficial plaintiff as an execution against her husband, after being duly notified, in writing, of her title thereto. It is contended there was error in this.

The uncontradicted testimony is that the property which was the subject of the alleged trespass, was given to Mrs. Freeman by her parents, shortly after her marriage in 1870, and continued to be her separate property until it was advertised and sold by the defendant, Sheriff Apple, on the execution against her husband, in disregard of the notice that it was owned and claimed by her as a parental gift. If the case had been submitted to the jury, it would have been impossible for them to have found otherwise, without disregarding the evidence. So clearly and conclusively were these facts proved that the learned judge in his charge assumed Mrs. Freeman's ownership, of the property in question, as an established fact; but, notwithstanding all this, he refused to affirm plaintiff's first point, and thereby instructed the jury that the sheriff was liable in trespass, if they be-

lieved the property belonged to her at the time of the sale, and was purchased by Mr. Slocum on his own account and is still owned by him. On the contrary, he withdrew the case from the jury by charging that "the right to the occupancy and enjoyment of the property has not been interfered with by the sheriff nor was it so interfered with at the time of bringing this suit, and your verdict will be for the defendants."

In this, we think, there was error. If the allegations of fact embodied in plaintiffs' points had been found in their favor they would clearly have been entitled to a verdict; and, for present purposes, it must be assumed they would have so found. As has already been suggested, there was no testimony on which a contrary finding, as to the main facts, could have been based. The fact that the levy was made by his predecessor in office furnished no justification or excuse to the sheriff for enforcing the levy by advertising and selling the wife's property on the execution against her husband, especially after having received written notice of her title; nor was the trespass in anywise condoned by the arrangement made with the purchaser, by which he permitted the property to remain in the possession of the plaintiffs in consideration of a certain rental for the use thereof. While it is true the maxim, *caveat emptor*, was applicable to the purchaser, and he took such title only as the defendant in the execution had in the property, it may have been both prudent and economical to recognize his title and make an amicable arrangement as to the retention and use of the property rather than embark in a controversy that might have involved both inconvenience and expense. But, it is claimed that, inasmuch as there was no manual seizure or removal of the property by the sheriff, no trespass was committed. We cannot regard this position as tenable. There was at least a constructive seizure and delivery to the purchaser. By disregarding the notice of title that was given, and proceeding to advertise and sell the goods of a stranger to the execution, he unlawfully exercised an authority over them against the will of the owner, and so far invaded her right of property as to subject himself to an action of trespass: *Paxton v. Steckel*, 2 Barr, 93, and cases there cited. In that case the court say, "It is not necessary to constitute trespass by an officer, who executes a writ of attachment on chattels, to prove any manual handling of the property, or taking them into possession. The levying of the attachment may be done without these acts and the property be fully bound by it. * * * Trespass *de bonis asportatis* against a sheriff is maintained by proof that he

unlawfully exercised an authority over the chattels against the will, and to the exclusion of the owner, though there was no manual taking or removal when he took them under process of law and by virtue of his office." In the case before us, the sheriff returned that after having given due and legal notice he did, on the 16th day of January, 1879, sell the property, etc. According to the authorities, the return is conclusive upon him and neither manual taking, occupation or removal was essential to render him liable to the beneficial plaintiff. The first and fourth assignments of error are therefore sustained.

It follows also from what has been said that the plaintiffs' second point should have been affirmed. The wife's right of action against the sheriff for illegally advertising and selling her property could not be defeated by the act of husband in recognizing the right of the purchaser at sheriff's sale and agreeing to pay him a stipulated sum for the use of the property. It would be a novel doctrine indeed to hold that her right of action against the sheriff could be preserved only by permitting the purchaser to remove the property, and thus deprive her of household furniture, beds, bedding and other articles necessary to the comfort of herself and family. No such unreasonable technicality as that can be invoked for the protection of a wrong-doer.

Judgment reversed and venire facias de novo awarded.

Circuit Court, United States.

Western District of Pennsylvania.

IN EQUITY.

LINTON et ux. v. THE FIRST NATIONAL BANK OF KITTANNING et al.

- (1.) At common law a man may lawfully change his name.
- (2.) In a suit by husband and wife in her behalf, a plea which alleges that the surname in which they sue is not the husband's real surname, but which does not deny that it is his known and recognized name, is bad.
- (3.) An appointment by an Orphans' Court in Pennsylvania of a guardian for certain designated estates of a non-resident minor, lying within the jurisdiction of the court, does not operate so as to constitute such appointee the general guardian of all the estates of such minor within the Commonwealth, but the guardianship is limited to the particular estates mentioned in the petition and order.
- (4.) Where B., in consideration of love and affection for his granddaughter, a minor, set apart for her separate use certain bank stock, the trust deed providing that she should not "sell, dispose of, or charge" said stock or its dividends without the consent and concurrence of such guardian or trustee as the proper court might appoint for her, but giving her "the full right to use

and enjoy" for her "own use" and that of her family all the dividends; the *cestui que trust* having attained her twentieth year and being then married, *Held*, that she was entitled to receive the said dividends directly from the bank without the intervention of either guardian or trustee.

Opinion by ACHESON, D. J. Filed March 11, 1882.

This is a suit in equity against the First National Bank of Kittanning, Pennsylvania, and James B. Neale. The bill describes the plaintiffs as Adolphus Frederick Linton and Phebe R. E. Elwina Linton, his wife, aliens, subjects of her Britannic Majesty Queen Victoria, domiciled in the Kingdom of England. The parents of the wife were John B. Finlay and Jane B., his wife, who was a daughter of James E. Brown, all of whom were residents at Kittanning, Armstrong county, Pennsylvania. Jane B. Finlay died December 30, 1876. James E. Brown died November 27, 1880. The bill alleges that Miss Finlay was born February 18, 1862, and was married December 10, 1878, at the British Embassy, at Paris, to the plaintiff, Adolphus Frederick Linton, a British subject.

On the 10th day of August, 1865, the said James E. Brown, in consideration of love and affection for his said daughter and granddaughter, by an instrument of writing, gave and assigned to their use 610 shares of the capital stock of said bank, upon the condition that the same should remain in his name and under his control as trustee during his life, for the sole and separate use of his said daughter during her life "and after her death for the exclusive use of her said daughter, Phebe R. E. Elwina," free from all debts and contracts of their husbands respectively; neither to sell, dispose of, or charge the said stock, "its accretions and accumulations," without his consent or that of such guardian or trustee as the proper court should appoint for his said granddaughter after his death; "Provided, however, that the said Jane during her life, and the said Phebe R. E. Elwina, after the death of the said Jane, shall have the full right to use and enjoy for their own use and that of their respective family or families, all or any part of the accretions or accumulations of said capital stock, and that the receipt of either of said beneficiaries while being such shall be a full discharge to myself or guardian or trustee as aforesaid for such accretions or accumulations in whole or in part as the same shall be received by them."

It appears that on April 1, 1878, the petition of Miss Finlay, then residing in the State of New York, was presented to the Orphans' Court of Armstrong county, Pennsylvania, for the appointment of a guardian. That petition

(omitting the address and signature) is in these words: "The petition of Phebe R. E. Elwina Finlay, at present a resident at Clifton Springs, in the county of Ontario, and State of New York, represents that your petitioner is a minor child of John B. Finlay, Esq., and of Mrs. Jane B. Finlay, lately deceased; that she is possessed of real and personal estates in right of her said mother, lying within the jurisdiction of said court, and has no guardian to care for her said estates. She therefore prays the said court to appoint James B. Neale, Esq., a guardian for the purpose aforesaid. The said James B. Neale is neither executor nor administrator of the estate from which my property is derived."

"CLIFTON SPRINGS, March 29, 1878."

Upon this petition the court made this order, viz:

"1st April, 1878, presented in open court, and on due consideration James B. Neale appointed guardian as prayed for. Bond in \$40,000 and J. E. Brown approved as surety."

"BY THE COURT."

It is shown that after the decease of Jane B. Finlay, and until the death of James E. Brown, the dividends on said stock by directions of Mr. Brown were placed upon the books of the bank to the credit of his granddaughter Elwina, both before and after her marriage, and paid out upon her checks or drafts. On February 6, 1879, Mr. Brown wrote in the dividend book opposite the 610 shares, "Place to the credit of Elwina F. Linton. J. E. BROWN."

And in two other instances he made similar entries. But the dividends declared since Mr. Brown's death have not been paid, but are withheld by the bank, the said James B. Neale having notified the bank to pay them to no one but himself, he claiming under the above appointment to be the general guardian of Mrs. Linton's entire estate.

The case is now before the court upon three motions. *First*—To strike off a plea filed by James B. Neale as frivolous and immaterial. *Second*—For a preliminary injunction to restrain him from collecting or interfering with the dividends declared or to be declared upon said stock. *Third*—For an order on the bank to pay Mrs. Linton the dividends declared in 1881.

(1.) The plea alleges that the plaintiff's real surname at the date of the suit was, and is, Spiller, and not Linton; and that the real name of said Adolphus Frederick Linton at the time of his marriage to Miss Finlay was Adolphus Frederick Spiller. The plea is not that the suit is by a fictitious person, nor is any question raised as to the identity of the plaintiffs. Confessedly, they are she who was Miss Finlay,

and her husband. Upon the pleadings it is admitted, at least impliedly, that Elwina's husband was married to her under the same name in which he now sues. The suit is in her behalf, and it would be strange, indeed, could it be defeated by the suggestion that the surname bestowed upon her in marriage is not her husband's true name. The plea does not deny that Linton was, at the time the bill was filed, and is now, the plaintiffs' known and recognized surname. If this be so, then it is wholly immaterial that the husband's inherited or original name was Spiller. At the common law a man may lawfully change his name. He is bound by any contract into which he may enter in his adopted or reputed name and by his known and recognized name may sue and be sued: *Doe v. Yates*, 5 Barn. & Ald., 544; *The King v. Inhabitants of Bellingshurst*, 3 M. & S., 250; *Petrie v. Woodworth*, 3 Calves, (N. Y.), 219; *In re Snook*, 2 Pitts. R., 28. The plea, I think, is bad, and must be overruled.

(2.) Undoubtedly under the ordinary appointment by the Orphans' Court in the exercise of its jurisdiction conferred by the Act of 29th March, 1832, Pur., 411, pl. 31, a guardian is entitled to the custody and care of all the estate, whether lying within the jurisdiction of the court or elsewhere in the Commonwealth, to which the ward may then be entitled or may subsequently acquire. The appointment of James B. Neale as guardian of Miss Finlay, however, was not made under that act, but, unmistakably, under the Act of 25th April, 1850, (*Ibid.*, pl. 33), which is as follows:

"The Orphans' Court of each county in this Commonwealth shall have power to appoint guardians of the estates of minors residing out of the Commonwealth, in all cases where such minors are possessed of estates lying within the jurisdiction of said court, upon the petition of the minors, or any of their relatives or friends, or any person interested in such estates, without requiring the said minors to appear in court to make choice of such guardians."

Now it may be, that the Orphans' Court in a proper case has authority under the Act of 1850, to appoint a general guardian of the entire estate within the Commonwealth of a non-resident minor, including both present and subsequent possessions. But whether so or not, it is clear to me that the act authorizes a more limited appointment. Be it observed, the appointment may be made upon the petition not only of the minor, or any relative or friend, but of "any person interested in such estates." Thus the tenant of a particular tract of land belonging to a non-resident minor may petition under this

act, but surely the order of appointment would be *quoad hoc*. It would be most unreasonable that upon such petition the court should appoint a general guardian, and it is inconceivable that the Legislature intended that all appointments under the Act of 1850 should be unrestricted. True, upon the view now adopted, there might be for the same non-resident minor two or more independent guardians, but each would simply perform the functions of curator of such part of the estate as might be committed to his custody; and herein I perceive nothing incongruous or mischievous. It is not even a novelty, for the same thing occurred anciently in guardianship by socage where the infant had lands by descent both *ex parte paterna* and *ex parte materna*. Tyler on Infancy, 237.

It seems to me that upon this construction of the Act of 1850, the proceedings in the Orphans' Court of Armstrong county were conducted throughout. The appointment of a general guardian was neither asked nor decreed. With much precision of language the petition sought the appointment of James B. Neale as guardian of the petitioner's estates of which she was then possessed in right of her deceased mother, and lying within the jurisdiction of the court. Here were two express limitations. The order of appointment, if of doubtful construction, should be read with reference to the petition: *Graham v. Railroad Co.*, 1 Wal., 704. But in fact it is equally definite. It adopted the limitations of the petition. I think it must be held to mean exactly what it says. To extend it by construction would be a dangerous and unwarrantable liberty.

It cannot, of course, be maintained that Elwina acquired any interest in this stock or its dividends through her mother. Mrs. Finlay herself had but a life-estate and Elwina takes her grandfather's bounty wholly under the trust deed.

(3.) While the trust deed provides that Elwina shall not "sell, dispose of, or charge" the said "stock, its accretions and accumulations," without "the consent and concurrence" of such guardian or trustee as the proper court shall appoint for her, it expressly gives her "the full right to use and enjoy" for her "own use" and that of her family all the said "accretions or accumulations," [i. e. dividends]. Now, although yet in her minority, she has passed her twentieth birthday and is married. The clear intention apparent and upon the face of the trust deed, is, that she may freely apply the whole income from the stock to the maintenance of herself and the expenses of her household. It is a moderate provision for these purposes in view

of her large estate and station in life. I see, therefore, no good reason why she should not receive these dividends directly from the bank without the intervention of either guardian or trustee. The latter would be a mere conduit. Her right thus to receive the dividends was recognized by all the parties in interest in Mr. Brown's lifetime, for by his directions the bank carried the dividends to his granddaughter's credit and she checked them out at her own pleasure. It is true the deed provides that her receipt shall be a discharge of the guardian or trustee, but this does not imply that the dividends shall pass through his hands but rather the reverse.

The bank has filed an answer, expressing its willingness to pay the said dividends to Mrs. Linton, if the court shall so direct, and submitting itself to the decrees of the court. The way, therefore, is clear to grant the order asked for unless it ought to be denied on account of the disclosures which James B. Neale has made to the court. As these disclosures relate largely to matters resting in mere rumor, unsupported by legal evidence, I refrain from the further mention of them in this opinion. I indulge the hope that they have no foundation in truth and that Mr. Linton may prove to be worthy of his wife's affection and confidence which it is plain he now possesses. The court is not called upon at this time to deal with the *corpus* of this stock or make any decree affecting Mrs. Linton's estate generally. These bank dividends should be applied to her comfortable maintenance in any view of the case. Indeed, if the worst that has been said of her husband be true, this might be but an additional reason why she should have the immediate use and enjoyment of this income which her grandfather's beneficence has provided for her.

The preliminary injunction will be allowed, and it will be ordered that the dividends be paid or transmitted directly to Mrs. Linton.

Let orders be drawn in conformity with the views expressed in this opinion.

For plaintiffs, Messrs. H. & G. C. Burgwin, J. P. Colter and G. W. Guthrie.

Contra, Messrs. D. T. Watson and G. C. Orr.

Orphans' Court.

In Re Estate of SARAH MARIA TERESA McKEAN, Deceased.

Where there are several separate tracts of land of a decedent to be valued for the purpose of fixing the amount of the collateral inheritance tax to be paid, the tracts should be valued separately as occupied by the tenants.

Although the Act of 10th of April, 1849, does not specify the manner in which the appraisement shall be made; yet the fact that it provided that the assessor of the ward or township in which the decedent died should be one of the appraisers, shows that it was the intention it should be made in the same manner that land was assessed for general taxation purposes.

Appeal from the appraisement fixing the value of real estate for the purposes of collateral inheritance tax.

Opinion by OVER, J. Filed February 23, 1882.

Mrs. McKean having died on the 5th day of November, 1874, the real estate which the appellants inherited from her is to be valued as of that date. It consists of eight adjoining tracts of land, known as numbers 107, 108, 109, 110, 111, 112, 114 and 115 of Breeding's Survey of District No. 3, containing in all 2,402 acres. Each of these tracts constitute a farm and they were leased to and occupied by tenants as such for a number of years prior to the decedent's death. The largest contains over three hundred acres of land and the smallest over two hundred.

The first question is as to the manner in which this land is to be valued. If it would be proper to make arbitrary subdivisions of the land into tracts of not more than one hundred acres each, and appraise the separate tracts, then the evidence is that the aggregate valuation of these subdivisions would be much larger than if it was appraised in the tracts as farmed and occupied by the tenants or as a whole.

The Act of Assembly provides that a fair valuation of the real estate of the decedent shall be made for the purpose of fixing the amount of the collateral inheritance tax thereon. It certainly contemplates that it shall be appraised as it stands at the death of the decedent.

If arbitrary subdivisions of the land could be made into one hundred acre tracts there is no reason why it could not be subdivided into any number of small tracts. Although the Act of 10th April, 1849, does not specify the manner in which the appraisement shall be made; yet the fact that it provided that the assessor of the ward or township in which the decedent died should be one of the appraisers, shows that it was the intention it should be made in the same manner that land was assessed for general taxation purposes. And the Act of the 27th July, 1842, Sec. 9, makes it the duty of assessors to value every separate lot, piece or tract of land, and they have in no case authority to make arbitrary subdivisions of the same. There can be no doubt then that the proper way to make the valuation of this land is to value the tracts

as accupied by the tenants separately. The contention of the appellants, however, that the land should be valued as a whole is not material, as the testimony shows that the market value of the land was the same whether offered for sale as a whole or in the separate tracts. The evidence in regard to the value of the land is very conflicting. The witnesses called by the appellants, fixing the average value of the land from ten to thirty dollars per acre, whilst the witnesses called by the appellee fix its average valuation at from forty to seventy-five dollars per acre. Although the witnesses differ so much as to the value of the land, yet they nearly all agree in their testimony as to its condition in November, 1874.

The land had been occupied by tenants for many years, it had been run down, the fences and soil were poor and the houses and barns were scarcely habitable. One of the witnesses for the appellee, who fixed the value of the land at forty dollars per acre, testified that it would have required an expenditure of that much per acre to have put it in good condition and made the necessary improvements. The testimony certainly presents a very desolate and cheerless picture of this land in 1874. Where the witnesses differ so much it is very difficult to determine what would be a fair valuation. But a careful consideration of all the testimony leads to the conclusion that the fair average valuation of the land, as of the 5th day of November, 1874, is thirty dollars per acre.

Under the act relating to collateral inheritance taxes interest at the rate of twelve per cent. per annum is to be charged on all such taxes as are not paid at the expiration of a year from the death of the decedent. Except where from claims made on the estate, litigation or other unavidable cause of delay, the estate cannot be settled up at the end of the year, six per cent. per annum is to be charged. It is contended by appellants that they are only liable to pay interest at the rate of six per cent. per annum. The only reason given to bring them within the exceptions to the act is that they were citizens of Spain and ignorant of our laws. As the appellants were bound to know the law and were also represented by agents, both in this city and Philadelphia, learned in the law, this objection does not appear to be well founded. The tax then is to bear interest at the rate of twelve per cent. per annum from the 5th day of November, 1875.

For appellants, *Messrs. Hampton & Dalzell and Charles Hart.*

For the Commonwealth, *R. B. Petty, Esq.*

Court of Common Pleas, No. 1.

IN EQUITY.

BAKEWELL & KERR v. N. J. KELLAR.

- (1.) The Court of Common Pleas in Pennsylvania have not general chancery powers, but only such equitable jurisdiction as is conferred on them by the Constitution and Acts of Assembly.
- (2.) Pennsylvania courts of equity have no power to compel the owner of letters patent to assign the same for the payment of a judgment debt, though courts of general equity jurisdiction have.
- (3.) The mere refusal to apply to the payment of a debt or judgment that which the law has not made the subject of seizure certainly cannot be called in any proper sense a fraud, either actual or constructive.

Messrs. Bakewell & Kerr filed a bill in equity, averring that N. J. Kellar, the defendant, was indebted to them in the sum of \$900, for which they had obtained judgment and issued execution, and the execution had been returned *nulla bona*. That they believed defendant to be wholly insolvent, and that he was the owner of certain valuable letters patent which could not be levied upon and sold by the ordinary process of *feri facias*, as no valid title could be acquired except by assignment. They prayed the court that they might be decreed to have a lien upon said letters patent, and that the same might be decreed to be surrendered up to a master or receiver, to be appointed by the court, by an assignment duly executed by the defendant in accordance with the provision of a Statute of the United States in that case made and provided to be sold, and the proceeds appropriated to the plaintiffs' judgment, and asked for an injunction to restrain defendant from encumbering or disposing of said letters patent pending the proceedings.

The defendant filed no answer and the court granted a preliminary injunction, which was afterwards dissolved.

For plaintiffs, Messrs. W. K. Jennings and Geo. H. Christy.

Contra, Messrs. W. C. Erskine and D. F. Patterson.

Opinion by STOWE, P. J. Filed January 16, 1882.

The bill in this case alleges that plaintiffs are creditors of the defendant, and having obtained judgment, a *feri facias* was issued, to which there was a return of *nulla bona*, and that the defendant is the owner of a patent right which cannot be seized for payment of debts. The only question that has given me any difficulty in this case is in regard to the jurisdiction of the court under the facts set out

in the bill. I have no doubt that in England and in the courts of the United States, where there is general equity jurisdiction, such a bill would be sustained; but in Pennsylvania we do not have any equitable jurisdiction except where it is specifically granted (*Donher's Appeal*, 64 Pa. St., 311), and we must, therefore, look to the Constitution and the various Acts of Assembly to determine our authority, and not to the general powers of a court of chancery.

The 20th Section of Article V of the Constitution declares: "The several Courts of Common Pleas shall have and exercise within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several Courts of Common Pleas of this Commonwealth, or as may hereafter be conferred upon them by law."

The Act of June 16, 1836, which is the principal source from which we obtain our present equity practice and jurisdiction, provides that the several Courts of Common Pleas shall have the jurisdiction and powers of a court of chancery so far as relates to

1. The perpetuation of testimony.
2. Obtaining evidence from places without the State.
3. The care of persons and estates of those *non compos mentis*.
4. The control, removal and discharge of trustees, the appointment of trustees and the settlement of their accounts.
5. Supervision and control of corporations, unincorporated associations and partnerships.
6. The care of trust money and property and other money and property made liable to the control of said courts.

And in such other cases as the courts had before that possessed such jurisdiction.

By the same act the Supreme Court, and now by subsequent enactment the several Common Pleas Courts are vested with the power and jurisdiction of courts of chancery so far as, first, the supervision and control of partnerships and corporations not municipal; second, the care of trust money, etc., as above; third, the discovery of facts material to a just determination of issues and other questions among or depending in said courts; fourth, the determination of rights to property or money claimed by two or more persons, and the possession of one claiming no right of property therein; fifth, the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals; sixth, affording specific relief when a recovery on damages is by an adequate remedy.

By the Act of 1840, the court of Philadelphia, and now all Courts of Common Pleas, were given chancery powers in all cases when chancery entertained jurisdiction upon the grounds of fraud, accident, mistake or account. The Act of 1845 extended the powers, or rather construed the previous powers of the court to extend to causes of constructive as well as actual fraud.

By another Act of 16th June, 1836, the Common Pleas Courts were clothed with a special power of discovery in aid of an execution, which is a proceeding at law in the nature of an equitable proceeding.

Subsequently the courts were also given chancery powers in dower and partition, and in some other matters not at all material to this inquiry.

It will be seen that no power such as claimed in this bill is specifically mentioned, and, therefore, if it exists at all it must be comprehended under some of the general terms contained in the Acts of Assembly. It is, however, contended that the term "fraud, actual or constructive," is broad enough to cover the claim. And it is not only clear to me, but conceded by counsel that unless it can be found there it does not exist.

It is therefore important that we should know what is the legal signification of "fraud." Fraud is actual and constructive. Any cunning, deception or artifice used to circumvent, cheat or deceive another, is said by Story, Vol. I, Secs. 186-7, to be a sufficiently accurate definition of what may be called positive, actual fraud. It is not contended that the case set out in the bill falls under this head. But equity also recognizes another large class of cases falling under the head of implied or constructive frauds.

Story further says: "That class properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence jointly reposed, and are injurious to another, or by which an undue or unwarranted advantage is taken of another." This certainly is quite as broad as the fact will justify. But taking this in its widest sense it does not include a mere moral duty, nor comprehend an act simply because it may be contrary to natural justice. Thus equity will no more enforce a promise not founded upon a sufficient consideration, however the promisee may have relied and acted upon it, and however much he may be injured thereby, than will the law.

Ex nudo pacto non oritur actio, is a maxim as distinctly recognized in equity as at law. Brightly says: "By constructive frauds are

meant such acts and contracts as, though not originating in evil design or contrivance to perpetrate fraud or injury upon other persons, yet by their necessary tendency to deceive and mislead them, or to violate public or private confidence, or to impair or injure public interests, are deemed equally reprehensible, in a legal point of view, with actual fraud."

The mere refusal to apply to the payment of a debt or judgment that which the law has not made the subject of seizure certainly cannot be called in any proper sense a fraud, either actual or constructive.

It may be morally wrong, and even absolutely dishonest, but certainly not legally or equitably wrong under any proper definition of fraud. It seems, then, clear that no proper interpretation of the term "constructive fraud," however strained, can support the plaintiff's claim as set forth in his bill.

So far as authority goes I have been unable to find any case where jurisdiction has been taken in such case as this by any of the courts of the United States where there were not general chancery powers conferred by the statute, or a special provision authorizing it.

Creditors' bills against a debtor in his lifetime are defined to be a bill filed by creditors who seek to satisfy their debts out of some equitable estate of the defendant which is not liable to levy and sale under an execution at law, or out of some property which has been put beyond the reach of ordinary legal process. The ground in the case of a patent right is the latter, viz., that it is beyond legal process. It cannot be taken and sold under an ordinary execution. It is, however, legal estate or property, and not equitable. The foundation of the jurisdiction in equity seems to be not fraud, but the general power of the court to deal with equitable property and rights.

The case of *Davis v. Gerhard*, 5 Wh., 470, decides that under the Act of 1836, conveying chancery power to the Supreme and Common Pleas Courts, the right to entertain a bill for discovery in aid of execution is not given, and in *Page v. Heath*, decided in 1867, 6 P. F. S., 219, Judge WILLIAMS, discussing the question of chancery jurisdiction in such cases, seems to have arrived at the same conclusion.

It is clear plaintiff cannot sustain his bill under the Act of 1836 giving Common Pleas Courts jurisdiction in aid of execution; and being of opinion that the Legislature have never conferred upon the courts of this Commonwealth chancery powers in regard to such a case as is set out in plaintiff's bill, the injunction heretofore granted is dissolved.

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No. 34.

PITTSBURGH, PA., APRIL 5, 1882.

Supreme Court, Penn'a.

THE PITTSBURGH AND CONNELLSVILLE
RAILROAD COMPANY, Respondent Below,
v. ROBERT M. MODISETTE et al.

THE PITTSBURGH AND CONNELLSVILLE
RAILROAD COMPANY'S APPEAL.

The injury complained of in a bill in equity was the non-payment of moneys which would be due if the defendant had continued to perform a contract.

Held, in the absence of any special grounds for equitable relief, that this was but a bare pecuniary obligation, the breach of which could be fully and adequately compensated by a recovery in damages in an action at law.

Where accounts are *unilateral*, and to be used only as a basis for ascertaining damage, courts of equity will decline taking jurisdiction of the cause, unless discovery is sought or required.

Koch and Balliet's Appeal, 9 W. N. C., 343, and *Gloninger v. Hazard*, 6 W., 401, followed.

Appeal from the decree of the Court of Common Pleas of Fayette county.

Bill in equity by Robert M. Modisette *et al.* against the Pittsburgh and Connellsville Railroad Company, praying for an account and for the ascertainment of damages due for breach of contract. After answer and replication filed, the cause was referred to a master, who reported in favor of the complainants, and his report having been confirmed by the court and decree made accordingly, the company respondent took this appeal.

The facts on which the proceeding was had are sufficiently stated in the opinion.

For appellant, *Messrs. Welty McCullough and Johns McCleave*.

Contra, *Messrs. L. H. Ruby and Edward Campbell*.

Opinion by GREEN, J. Filed January 9, 1882.

The proceeding in this case was a bill in equity which prayed for an account of moneys received and which ought to have been received by the defendant, and for the payment to the plaintiffs of so much thereof as might be found

due to them, and also for the ascertainment of damages due for the breach of a contract.

The instrument upon which the proceeding was found was a contract in writing made between James L. Shaw and the Pittsburgh and Connellsville Railroad Company. It is dated March 6, 1865, and in substance it provides that Shaw shall, at his own cost, construct and equip a line of telegraph along the company's railroad from Connellsville to Uniontown. The consideration for this work is "the maintenance and working of the line by the said railroad company when constructed," and also the payment by the company to Shaw of one-half of all its earnings, subject to the stipulations of a previous agreement made by the Pittsburgh and Connellsville Railroad Company with the United States Telegraph Company for the construction of the same line of telegraph, and dated March 1, 1865. This latter agreement provided that the line should be used for commercial and railroad business, and that the moneys received at Uniontown for messages over any line or lines of the United States Telegraph Company should be retained by the Pittsburgh and Connellsville Railroad Company, and the moneys received by the telegraph company for messages for Uniontown and for any offices between Connellsville and Uniontown, at any of the telegraph company's offices, should be retained by the telegraph company. There was also a provision giving the telegraph company the privilege of purchasing the line at any time they might choose to do so, upon terms stated. There was no limitation of time for the running of either contract.

The practical effect of the agreement between Shaw and the Railroad company was that he was to build a telegraph line for the company which they were to maintain and pay him one-half of the receipts to which they were entitled under their contract with the United States Telegraph Company. Undoubtedly a covenant would be implied on the part of the railroad company to do business on the line of telegraph as that was the manifest purpose of the contract: *Watson v. O'Hern*, 6 W., 362; *Lynn v. Miller*, 12 Harris, 392; *Koch and Balliet's Appeal*, 9 W. N. C., 343. It is equally clear that for a breach of this implied covenant, or of the express covenant for the payment of one-half the earnings, Shaw would be entitled to compensation in damages in an action at law on the contract: *Koch and Balliet's Appeal* and cases cited, *supra*. Now the injury complained of in this case is, that the Pittsburgh and Connellsville Railroad Company, after having for nine years performed the contract on their part

and paid the plaintiffs \$2,912 as their share of the earnings, from and after April 1, 1874, excluded all commercial business from the telegraph line and neglected and refused to make any compensation for the use of the line.

The bill further charges that the railroad company has realized large profits from the use of the line, but refuses to pay to the plaintiffs their share of the same, and by excluding from the line the commercial business, has rendered the line valueless to the plaintiffs. There is some apparent incongruity in these last averments, but that is quite immaterial, since so far as the rights of the plaintiffs are concerned it is only essential to consider this actual breach of the covenants expressed or implied in the agreement between the parties. It may be mentioned, though it is not material to the discussion, that the rights of Shaw, under the contract in question, were duly passed to the present plaintiffs by assignment, and also that by a subsequent agreement in 1867, between the Pittsburgh and Connellsville Railroad Company and the Western Union Telegraph Company, which had become vested with the rights and property of the United States Telegraph Company, some modification was made in contracts existing between the Pittsburgh and Connellsville Railroad Company and the United States Telegraph Company. There is nothing, however, in this latter contract that can affect any matter at issue in the present contest, as it would not be competent for the defendant to affect any rights of the plaintiffs by any agreements with other parties unassented to by the plaintiffs.

Returning to the consideration of the principal contract involved in the controversy, we find that the injury complained of is the non-payment of moneys which would be due to the plaintiffs if the defendant continued to maintain and work the line. For the time that it was worked, according to the agreement, the moneys actually received were in good faith divided. The plaintiffs have no ownership of the telegraph line—they have no right to participate in working it. The defendant has the exclusive right to take the earnings, and when they are received they are the sole property of the defendant.

After their receipt arises the obligation to pay to the plaintiffs a sum equal to one-half of the amount received. Surely this is but a bare pecuniary obligation, the breach of which is fully and adequately compensated by a recovery in damages of the amount which ought to be paid. And so also if the defendant fails to carry on the business according to the agreement, and by reason of such failure does not receive the

moneys which would have come to hand, had the business actually been conducted, here again is but a breach of the contract which can be compensated in damages. In either or any aspect of the case, therefore, the remedy of the plaintiffs is adequate and ample by action at law. In the present case there is no element of specific performance, and a decree to that effect could not have been made if it had been asked—no such prayer, however, is contained in the bill. There is no matter of fraud, mistake, accident, trust, discovery or mutual account in the bill or in the case, and hence we are unable to perceive any species of equity jurisdiction upon which a decree can be founded.

The only accounting that can enter into the case is *unilateral*, and even that is only a basis for ascertaining damage. The authorities applicable to the controversy are quite familiar, and only a brief reference to a few of them is required. In *Gloninger v. Hazard*, 8 W., 401, it is said: "There is no doubt of our concurrent jurisdiction with courts of law, in matters of account, where the accounts are mutual and complicated, and also where they are all on one side, but discovery is sought and is material to the relief * * * but on the other hand, where the accounts are all on one side and no discovery is sought or required, courts of equity will decline taking jurisdiction of the cause." See also 2 Norris, 441; *Kauffman's Appeal*, 5 P. F. S., 383.

A complainant averred that he agreed to sell a lot to the defendant, he to pay at the same rate as he paid others, and that he paid others at a rate which he refused to pay to complainant, and prayed for specific performance. *Held*, that the agreement was simply for the payment of money and complainant had an adequate remedy at law: *Koch and Balliet's Appeal*, *supra*. Where a right to mine is granted, in consideration of a royalty reserved, the law implies a covenant by the grantee to work the mine with diligence so that the grantor may receive the contemplated compensation; but in the absence of special grounds of equity jurisdiction, such covenant will not be specifically enforced in equity, an action at law for damages being an adequate remedy. See also *Grubb's Appeal*, 9 Norris, 228.

It is unnecessary to prolong the citations. We are of opinion that the plaintiffs have an adequate remedy at law, and that there was no special grounds of equitable relief exhibited.

In such cases there is no jurisdiction in equity to entertain the complaint or make any decree.

Decree reversed and bill dismissed at the costs of the appellees.

**THE COUNTY OF CRAWFORD, Defendant
Below, v. WILLIAM NASH.**

The Act of 15th April, 1834, P. L., 544, providing a method for fixing the compensation of county treasurers, is not abrogated by the 5th Section of Article XIV, nor by Section 13, Article III, of the Constitution of 1874, in counties of less than 150,000 inhabitants. The word "law," as used in these sections, does not extend to ordinances of municipal corporation and does not apply to the authority vested in county commissioners and auditors, under the provisions of the Act of 15 April, *supra*.

The salaries of county treasurers, not otherwise provided for by "law," are to be ascertained and paid as heretofore, and the county commissioners, with the approbation of the county auditors, may fix the rate of compensation to be allowed after the election of county treasurers.

Baldwin v. The City of Philadelphia, 29 PITTSBURGH LEGAL JOURNAL, 123, approved.

Error to the Court of Common Pleas of Crawford county. The facts are fully set forth in the opinion.

Opinion by PAXSON, J. Filed January 3, 1882.

At the time the present constitution was adopted, the only provision for the compensation of county treasurers was contained in the 41st Section of the Act of 15th April, 1834, P. L., 544, as follows: "Each county treasurer shall receive, in full compensation for his services on behalf of the county, a certain amount per cent. on all moneys received and paid by him, which rate shall be settled from time to time by the county commissioners, with the approbation of the county auditors." Since the passage of said act the compensation of the respective county treasurers has been fixed by the county commissioners and county auditors as provided therein, except in counties having a population of over 150,000 inhabitants, as hereinafter stated.

The plaintiff below was elected treasurer of Crawford county at the November election, 1878, and entered upon the duties of his office on January 6, 1879. The compensation of the outgoing treasurer as fixed under the Act of 1834 was two and one-fourth per cent. upon all moneys received and paid out. Upon the 11th day of February, 1879, the commissioners and auditors of Crawford county met and unanimously agreed that the compensation of plaintiff as county treasurer should be fixed at one and one-fourth per cent. The plaintiff contends that this action violates the 13th Section of Article III of the Constitution which declares that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

The Act of 1834 has never been repealed. It may be assumed the convention regarded it with disfavor from the fact that Section 5 of Article XIV of the Constitution provides that "the compensation of county officers shall be regulated by law, and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive, into the treasury of the county or State, as may be directed by law. In counties containing over 150,000 inhabitants all county officers shall be paid by salary, and the salary of such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by or for him." The Act of 31st of March, 1876, P. L., 13, was passed, as its title imports, to carry into effect this section of the constitution. It refers, however, only to counties having a population in excess of 150,000. As to them specific salaries are fixed by said act for all county officers, including the treasurer. Then we have the Act of 12th of June, 1878, P. L., 187, which ascertains and appoints the fees "to be received by the sheriffs, coroners, prothonotaries, clerks of the several courts, registers of wills and recorders of deeds of this Commonwealth, except in counties containing more than 150,000 inhabitants or less than 10,000 inhabitants." No provision is here made for county treasurers, nor is any reference made to their compensation in subsequent legislation, save the Act of 30th of April, 1879, P. L., 34, which allows them a fee of twenty-five cents for a certified copy of a receipt for the payment of taxes on unseated lands, and the 6th Section of the Act of 6th of June, 1879, P. L., 102, which allows county treasurers a commission of one per centum on the military fund received and paid out by them.

It will thus be seen that the General Assembly has neglected to enforce by appropriate legislation that portion of Section 5 of Article XIV, which declares that "the compensation of county officers shall be regulated by law," so far as the county treasurers are concerned, except in the few counties whose population exceeds 150,000. We have no doubt this omission was unintentional. What concerns us now is its effect upon the Act of 1834.

It may be conceded that since the adoption of the constitution the General Assembly could not lawfully pass such an act as that of 1834, for the reason that the section of that instrument referred to imposes upon that body the duty of regulating the compensation of county treasurers. It is too plain for argument that a duty thus imposed cannot be delegated to the county commissioners and county auditors. "The com-

pensation of county officers shall be regulated by law" is the imperative command of the constitution. This plainly means that it shall be ascertained and defined by the Legislature. No such language is to be found in the Constitution of 1838. It does not follow from this, however, that the Act of 1834 fell with the adoption of the constitution. It has been repeatedly held that the constitution is not self-executing except wherein it so expressly provides. This subject is discussed and the authorities collected in *The County of Allegheny v. Gibson*, 9 Norris, 397. It was accordingly held in *Perot's Appeal*, 5 Id., 335, that the 18th Section of the above recited Act of March 31, 1876, relative to the salaries of county officers, which postpones the operation of the act until the expiration of the terms of the incumbents, was constitutional.

Under all the authorities the Act of 1834 must be regarded as still in force. If not preserved by Section 2 of the schedule it is apparent that since the adoption of the constitution there has been no provision in counties containing less than 150,000 inhabitants for compensation of county treasurers, and all allowances to such officers have been without law.

It was urged, however, that conceding all this to be true, the compensation to county treasurers cannot be increased or diminished during the term for which they are elected, by reason of the 13th Section of Article III. In *Baldwin v. The City of Philadelphia*, 29 PITTSBURGH LEGAL JOURNAL, 123, it was held that the word "law" in this section of the constitution did not extend to the ordinances of a municipal corporation; that it included only such laws as emanated from the Supreme power, which in this Commonwealth is lodged in the General Assembly. In *Rucker v. Supervisors*, 1 W. Va., 661, which arose under Section 9 of Article III of the Constitution of West Virginia, which provides that the compensation of public officers shall not be increased or diminished during their term of office, it was held that this language in the constitution applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law, either by the Constitution of the State or by some statute made in pursuance thereof. If the ordinances of a city are not laws within the meaning of this clause in the constitution, much less so are the orders or agreement of the county commissioners and county auditors in regard to the treasurer's salary. The obvious meaning of the constitution is that the General Assembly should regulate; that is, ascertain and establish the compensation which should be paid to the respective county treasurers, and

that thereafter "no law;" that is, no Act of Assembly, should increase or diminish their respective salaries during the term for which they were elected. The whole difficulty in the case in hand grows out of the omission of the Legislature to perform this duty. We have no doubt it will be promptly attended to, now that attention has been called to it. In the meantime the Act of 1834 remains in force, and the salaries of county treasurers, not otherwise provided for by law, will have to be ascertained as heretofore.

The judgment is reversed and judgment is now entered in favor of the defendant below upon the special verdict.

For plaintiff in error, defendant below, *Thos. Roddy, Esq.*

Contra, W. R. Bole, Esq.

JOHN C. JOHNSON, Defendant Below, v. THE HOOSIER DRILL COMPANY.

A contract of agency provided that the agent "should make every reasonable effort to sell as many of said implements in said territory as the trade therein will demand, by thoroughly and diligently canvassing the territory," and that he would not "sell (directly or indirectly) any other grain drill except the Hoosier, while this agency exists." The agent sold twenty drills but the principals were only enabled to furnish five for delivery to the purchasers. In an action against the agent to recover for the five drills, held, that an agreement to deliver such implements as the agent should succeed in selling, was necessarily implied from the express terms of the contract, and that he could set-off the value of his services in making such sales or the amount he would have realized by said sales if the drills had been furnished.

Per PAXSON, J.: When an agent sells an article, with the authority of the principal, I know of no rule of law which would justify a refusal to deliver it on the part of such principal, and at the same time deny all compensation for the breach.

Error to the Court of Common Pleas of Fayette county. The opinion states the facts.

Opinion by PAXSON, J. Filed January 3, 1882.

The Hoosier Drill Company, plaintiffs below, appointed the defendant their agent to make sale of their agricultural implements in certain townships of Fayette county. The article of agreement between the parties, after having in express terms created such agency, contains this further provision: "In consideration of the said agency the said J. C. Johnson & Co. hereby agrees to make every reasonable effort to sell as many of said implements in said territory as the trade therein will demand, by thoroughly and diligently canvassing the territory herein mentioned during the season, and

also agrees to guarantee the sale of all the following described implements, and all others ordered by them during the season, and further agrees not to sell (directly or indirectly) any other grain drill except the Hoosier while this agency exists."

The evidence on the part of the defendant shows that he was engaged for about two months in canvassing the district, a portion of the time with an assistant, and expended a considerable amount of money in prosecuting said canvass. He succeeded in making sales of a number of plaintiffs' articles, among others upwards of twenty drills. He was able to deliver only five drills, the plaintiffs having declined to furnish more upon the ground of their inability to do so, the demand for their implements having greatly exceeded the capacity of their works. The plaintiffs having brought suit to recover the value of the five drills delivered, the defendant attempted to set-off by way of defense the damages sustained by him by reason of plaintiffs' refusal to deliver the drills as ordered. By the defendant's point the learned judge was requested to instruct the jury: "That if defendant, under the contract of B. of December, 1878, performed services, and made sales of drills, etc., which he was authorized to sell, and ordered the same from the company, and the company refused or failed to furnish the drills, etc., so sold and ordered, the defendant may set-off against plaintiffs' claim the value of his services in making such sales, or the amount he would have realized by said sales if the drills had been furnished."

This instruction was refused, the learned judge conceding the merit of the defense, yet holding under the language of the contract the defendant could not avail himself of it, and gave the jury a binding instruction to find for the plaintiffs.

No reason was given for this ruling. In the argument at bar, however, the learned counsel for the plaintiffs relied principally upon the following: 1st. That the defendant had not taken written orders from the purchasers as required by the agreement; and 2d. That the company did not agree to furnish the drills.

It is sufficient to say, in regard to the first proposition, that the company did not decline to furnish the drills, because the defendant did not send written orders from the purchasers. On the contrary it distinctly appears from the plaintiffs' letters of August, 25th and September 30, 1879, that the refusal was "not from any lack of desire on our part, but because we were entirely unable to fill your orders at time received. It was not in our power to meet the demand in

full for our drills this season." The reason now set up, that the orders were not in writing, is manifestly an after thought, and an attempt to avoid the consequences of their failure to deliver the drills.

An agreement to deliver such implements as the defendant should succeed in selling is necessarily implied from the express terms of the contract. The defendant was not only authorized to sell, but he was required to exert himself to do so; he was to canvass the territory specified in the agreement, and he was, moreover, bound not to sell any other grain drill than the one made by plaintiffs. When an agent sells an article, with the authority of the principal, I know of no rule of law which would justify a refusal to deliver it on the part of such principal, and at the same time deny all compensation for the breach.

The defendant's point should have been affirmed. The right under our defalcation act to set-off the damages arising from such breach of contract has been settled by *Shaw v. Badger*, 12 S. & R., 275; *Huber v. Tammey*, 5 Watts, 51; *Patterson v. Hulings*, 10 Barr, 508; *Hunt v. Gilmore*, 9 P. F. S., 450, and numerous later cases.

Judgment reversed and venire facias de novo awarded.

For plaintiff in error, defendant below, *Messrs. Boyle & Mestrezat*.

Contra, W. H. Playford, Esq.

OLIVER LACOCK, Defendant Below, v. THE COMMONWEALTH OF PENNSYLVANIA, for the use of A. J. RIGGLE.

In an action of debt on a bond against an administrator and his surety, where the administrator dies and his name is stricken from the record, the suit proceeding against the surety alone,

Held, that the plaintiff in the action, a devisee under the testator's will, was incompetent to testify as to any matters occurring prior to the death of the administrator.

Error to the Court of Common Pleas of Washington county.

Opinion by PAXSON, J. Filed January 3, 1882.

This record presents the single question of the competency of the plaintiff below as a witness. The suit was an action of debt upon a bond given by Samuel I. Hughes, who was administrator of Samuel Riggle, deceased, and Oliver Lacock, who joined in the bond as surety of Hughes. The bond was conditioned for the proper application of the proceeds of certain real estate sold by the administrator in pursuance of an order of the Orphans' Court. Hughes,

the administrator, was served and appeared by counsel. His deposition was subsequently taken, after which and before the trial of the case, he died, and upon motion his name was stricken from the record, leaving the suit to stand against Lacock, the surety alone. Upon the trial the plaintiff was admitted as a witness to prove that he had never received his distributive share of the estate, and that a receipt for such share, purporting to be signed by him, was not in fact so signed, nor was it signed for him by any one with his authority.

It is very clear that if the death of Hughes had been suggested upon the record and his administrator substituted the plaintiff would have been incompetent. It has been repeatedly held that if there be an executor or administrator properly upon the record at the time of trial, the competency of witnesses remains as before the passage of the Act of 1869: *Brady v. Reed*, 6 Norris, 111. Does the fact that the name of Hughes was stricken from the record make any essential difference? The effect of this was, as before observed, to charge the surety alone. Yet the recovery here was a substantial recovery against the estate of Hughes. The judgment against the surety would be conclusive evidence in a suit by him against Hughes' administrator for the reason that Hughes had notice. He was an original party and appeared by counsel. He would be liable upon the contract of indemnity which the law implies the moment the surety's obligation is entered into. A judgment recovered against a surety is always evidence in an action by him against his principal: *Clark's Executors v. Carrington*, 7 Cranch, 308; *Drummond v. Prestman*, 12 Wheaton, 515; Wharton on Evidence, § 770, and it is conclusive evidence when notice has been given to defend the action: *Lloyd v. Barr*, 1 Jones, 41; *Hanna v. Wray*, 27 P. F. Smith, 27; Greenleaf on Evidence, § 188.

The fact the deposition of Hughes was read in evidence by the defendant does not affect the competency of the plaintiff. The latter was examined before the deposition was offered. Beside, Hughes was a competent witness when his deposition was taken, and his subsequent death did not render his testimony taken before his death incompetent. This has been ruled in several recent cases. It is sufficient to refer to *Evans v. Reed*, 28 P. F. Smith, 415, and 3 Norris, 254.

We are of opinion that the plaintiff was incompetent to testify as to any matters which occurred prior to the death of Mr. Hughes. This sweeps away all of his evidence that is of any value, which in view of the whole case,

and of his laches in bringing this suit, is not much to be regretted.

Judgment reversed and venire facias de novo awarded.

For plaintiff in error, *Messrs. McCracken & McIlwaine* and *John L. Gow*.

Contra, *Clark Riggle, Esq.*

ALLEGHENY NATIONAL BANK'S APPEAL.

Owely of partition constitutes a first lien on the purpart of a former tenant in common, and is entitled to priority over a mortgage on his undivided interest, given by him before partition.

McCandless' Appeal, 29 PITTSBURGH LEGAL JOURNAL, 166, followed.

Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county.

Opinion by MERCUR, J. Filed January 3, 1882.

This fund in contention was produced by a sheriff's sale of the land of Mrs. Annie E. Mackey. It was allotted to her in the partition of the estate of her father, John Adams. In his devise to her of a distributive share, he directed that certain debts and claims should be deducted therefrom, thus practically making them a charge on her portion for the benefit of the estate. The claim of the appellant is one of those referred to in the will. In the partition this claim was charged as owely of partition on the purpart allotted to Mrs. Mackey. The appellant claims by virtue of the decree so charging it. The appellee claims on a mortgage executed by Mrs. Mackey and her husband, on her interest in the whole land, before partition.

The decree, dividing the sum charged as owely, on the purpart allotted to Mrs. Mackey is in an unusual form, and rather irregular; but it stands as a final decree. In this collateral proceedings its validity and conclusive effect cannot be questioned. It does, however, appear on the facts found by the auditor, that the decree was equitable between all the parties thereto, and worked no injustice to her creditors. Full effect must then be given to the claim of the appellants as one of owely. Whether it constitutes a lien prior to that of the mortgage is the question?

The precise question was before us in the recent case of *McCandless' Appeal*, 29 PITTSBURGH LEGAL JOURNAL, 166. The authorities were fully examined and considered. We there held that owely of partition constitutes a first lien on the purpart of the former tenant in common, and is entitled to priority over a mortgage on his undivided interest, given by him before partition. That case is fully sustained by the au-

thorities. It is unnecessary to cite them now, or repeat the argument there presented. We adhere to it as a settled rule of law. In so far as the first and third assignments might be understood as giving to the claim of the appellant a preference over other claims of owelty, secured by the decree in partition, they are not sustained. With all such its lien stands on an equal footing. The second assignment is sustained.

Decree reversed and record remanded with instructions to decree distribution conformably with this opinion, and that the costs of this appeal be paid out of the fund.

For appellant, *Messrs. Geo. Shiras, Jr., and C. C. Dickey.*

Contra, Messrs. John Barton and Whitesell & Son.

JOHN N. STRAUB, Defendant Below, v. THE CITY OF ALLEGHENY.

An owner of property near a street in progress of improvement by the City of Allegheny, under special Acts of Assembly, petitioned with others to the City Councils to maintain the existing grade, setting forth in the petition that the street at that grade would make a street car line practicable and render the business part of the City and the markets "easy of access and convenient" to the petitioner, and that he was entitled to a voice in the matter as he would be expected to pay his quota toward the cost of grading and paving the street. *Held*, that the petitioner was estopped by his petition from setting up the unconstitutionality of the Acts of Assembly, and the consequent want of jurisdiction in the City to make the assessment, or that the property was not a proper subject of local taxation.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

The claim sought to be recovered in this action was a local assessment for the cost of grading and paving a portion of Troy Hill Road in the City of Allegheny. The improvement was made under an Act of Assembly, approved May 10, 1871, and a supplement thereto, approved April 1, 1872. The original act authorized the City to assess and apportion the costs of the improvement upon property within the City and Reserve township. The supplement extended the territory to be assessed to property outside of the City or Reserve township. These Acts of Assembly were passed upon by the Supreme Court in *Beckert v. Allegheny*, 85 Pa. St., 191. At the time of the passage of the act in question, the property against which the assessment was made, was located in Reserve township. Prior, however, to the passage of the ordinance for the improvement, the property was annexed to the City by an Act of Assembly, approved April 4, 1872. While the improve-

ment was in progress, the defendant below, joined with others in a petition to the City Councils setting forth that the petitioners were property owners on Troy Hill in the Seventh and Eighth wards of the City of Allegheny, that they had received information that a petition would be presented to Councils asking for a change of grade on Troy Hill Road, from seven feet to the hundred, the established grade, to eight feet; that the petitioners would be expected to pay their quota toward the cost of grading and paving said road, and were, therefore, entitled to a voice in the matter of a change of grade; that the petitioners believed the proposed change of grade would not be of so great a benefit to them as would entitle them in justice or equity to contribute toward the cost of making the road, for the reason that the only benefit they could possibly derive from said road when finished would be, that with a grade of seven feet a street car line would be practicable in so far as to make it pay, and thus render the business part of the City and the markets easy of access and convenient to the petitioners, and they, therefore, remonstrated against any change of grade.

The effect of this petition was commented upon in *Dewhurst v. City of Allegheny*, 28 PITTSBURGH LEGAL JOURNAL, 113. The grade of the street was not changed. A municipal claim for the cost of grading and paving of Troy Hill Road was entered against the property of the defendant below, upon which a *scire facias* was issued and issue joined. Upon the trial the plaintiff below offered in evidence the petition above set forth.

The defendant offered to prove that the improvement mainly was a roadway through a deep ravine, connecting two districts of the City, the main portion of the City being on one side and a portion of the City on Troy Hill on the other side, for the purpose of showing that the improvement was not of a local character, but for general public benefit. He also offered to prove that the property of the defendant and other property assessed was used for farming and agricultural purposes, dairies and gardening, for the purpose of showing that the property assessed was rural in its character and not a proper subject of local assessment. The plaintiff objected to both offers for the reason that the defendant having encouraged the improvement was estopped.

The testimony under both offers was excluded. The counsel for defendant asked the court to charge: "That under the evidence in this case, it appearing that the property against which the lien is filed, was, at the time of the adoption

of these Acts of Assembly under which the improvements and assessments were made, within the limits of Reserve township and not under the jurisdiction of Allegheny City, the assessments thereon are unauthorized, and therefore the verdict should be for defendant." The court declined to so charge and instructed the jury that, under all the evidence, their verdict should be for the plaintiff.

For the exclusion of evidence under the offers and the refusal of the court to charge as requested, the defendant took a writ of error.

For plaintiff in error, defendant below, *McBry's*.
Stagle & Wiley.

Contra, W. B. Rodgers, Esq.

PER CURIAM. Filed November 14, 1881.

Without entering upon an examination of the several points raised on this record, we think, upon the undisputed evidence, the defendant below was clearly estopped by the petition to the Councils in which he united with others from taking the defense of which he now seeks to avail himself. He admitted in that petition that he expected to pay his quota towards the cost of grading and paving, and that the road would be a local benefit to him by making "the markets easy of access and convenient" to him.

Judgment affirmed.

Court of Common Pleas, No. 1.

McGINNIS, Trustee, for use, v. JOS. H. DAVIS,
with Notice to W. W. PATRICK, Terre-tenant.

Orphans' Court sales in partition are judicial and divest all liens.

A purchaser at such a sale, from an officer of the court, is not affected by any neglect or misconduct of such officer, arising after the payment of the purchase money and delivery of the deed, nor can the land be held, even when the trustee fails to distribute as directed.

Rule on defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defense.

Scire facias sur mortgage, with notice to terre-tenant.

Terre-tenant in his affidavit of defense set up, *inter alia*, "that in certain proceedings in partition had at No. 3 of June Term, 1864, of the Orphans' Court of Allegheny county, it does not appear by the record that all the heirs interested therein had receipted for their distributive shares of the proceeds of sale thereunder, and deponent insists that the said record should be perfected in that particular before he be re-

quired to pay the money due or to become due on said mortgage," and claimed the right to deduct the amount from the amount of purchase money claimed in the suit.

For the rule, *W. C. Erskine, Esq.*

Contra, Thos. C. Lazeear, Esq.

Opinion by STOWE, P. J. Filed March 20, 1882.

Orphans' Court sales in partition are judicial sales (*Sackett v. Twining*, 6 Harris, 202; *Jacob's Appeal*, 11 Id., 477), and divest all liens.

The confirmation of the sale fixes the terms and a delivery of the deed upon payment of the money to the trustee conveys an absolute title to the extent of the interest sold free from liens, and the trustee is bound to distribute under the order of the court and with which the purchaser has nothing to do.

It seems to me absurd to suppose that a purchaser, from an officer of a court, is to be held in any respect liable for the neglect or misconduct of such officer, arising after payment of purchase money and deed delivered. If such a rule were to prevail no one would be safe in purchasing in such case.

It is clear to my mind that the land can in no manner be held, even when the trustee fails to distribute as directed. *WOODWARD, C. J.*, in *Dixey's Executors v. Laving & Sill*, 49 Pa. St., 146, says: "Sales by order of the Orphans' Court are judicial sales, and purchasers at an Orphans' Court sale are no more responsible for a proper application of the purchase money than purchasers at any other judicial sale. The law, when it assumes custody of a debtor's or decedent's real estate, and converts it into money, is supposed to follow the money to its appropriate destination, and the purchaser is excused from this duty."

Rule absolute.

Court of Common Pleas, No. 2.

JOHN H. McMASTERS and FRANCIS McMASTERS, His Wife, in Right of Said FRANCIS McMASTERS v. THE PENN. BANK.

On the trial of an issue under the Sheriff's Interpleader Act, the jury returned a verdict for the claimant. No bond had been given, and the goods having been sold by the sheriff, the claimant brought an action against the plaintiff in the execution to recover the difference between the actual value of the goods and the amount realized by the sheriff's sale. *Held*, that she could not recover.

Quære, whether the claimant is entitled to recover the costs deducted from the proceeds of the sale.

Questions of law reserved.

Opinion by EWING, P. J. Filed March 4, 1882.

The defendant having seized the goods of the plaintiff on an execution against her husband, notice of plaintiff's claim was given to the sheriff, who entered a rule to interplead. On hearing of the parties the rule was made absolute and an issue was awarded. The claimant, being unable to give bond, the court by consent of the parties directed the goods levied on to be sold and the proceeds to be paid into court to abide the event of the issue. The goods were sold for \$628.98 from which the sheriff's costs, \$118, were deducted, and the net proceeds, \$510.98, were paid to the claimant, upon the issue having been determined in her favor. This suit was brought to recover damages for the wrongful action of the plaintiff in the execution. The jury have found that the goods so sold were in fact worth \$945.84 over and above the net proceeds of sale received by the plaintiff under the proceeds on the Sheriff's Interpleader. The plaintiff in the execution having directed the sheriff to levy on the goods is liable for any illegal damage done to her thereby. Clearly it is liable for the damages the jury have assessed for the taking and holding of the goods up to the date of the Interpleader, as also for the value of the goods not sold or accounted for, and which were seized. On first impression it would seem that the plaintiff should also recover for the actual damage done her by the sale of the goods. The equities appear to be with her. Can she in law recover for the damage done to her? The sheriff's rule for an Interpleader, and the proceedings thereon are judicial proceedings, authorized by the statute. The action of the court was taken after a due hearing of the parties concerned. The order of sale was made by agreement of the parties, and even without such agreement the court could have ordered the sale. In view of the law the proceeds of sale took the place of the goods. Grant that the plaintiff has suffered by the action, it does not follow that she can recover. It is a rare case in which the defendant, who has won his case, is not damaged beyond the amount of costs recovered. Yet the unsuccessful plaintiff is only liable for the *abuse of legal process*; that is, when his action has been without probable cause and malicious, that the successful defendant can recover his actual damages. The evidence shows that the bank acted on probable cause and in good faith. This loss of the difference between the actual value of the goods and the amount realized by the sheriff's sale results from the action of the court in a case properly before it, and clearly within its

jurisdiction. On principle the plaintiff cannot recover. Our Sheriff's Interpleader Act is substantially a transcript of the English Act of 1 and 2 Will 4th. In *Walker v. Olding*, 1 H. & C., 621, our question was squarely decided. Both before and after the levy on his goods the claimant gave notice to the plaintiffs in the execution that he owned the goods—they directed the sheriff to make the levy. The sheriff having made his levy, entered a rule on the plaintiff and claimant to interplead. The court made the rule absolute and awarded an issue. The claimant being unable to give the necessary bond, the court ordered the property to be sold and the process to abide the event of the issue. The issue having been decided in favor of the claimant, and he having received the proceeds of sale, brought suit against the plaintiff in the execution to recover damages. The jury found that the actual value of the goods was more than double the amount realized by the sale. The court held, on the reserved question, that the plaintiff (claimant) could not recover for this difference. In *Zacharias v. Totten*, 9 Norris, 292, the case of *Walker v. Olding*, *supra*, is cited, and the principles laid down in that case are approved and adopted as the correct interpretation of our statute.

It is claimed by the plaintiff's counsel that they are entitled to recover for the costs deducted from the proceeds of sale under the interpleader proceedings. We do not see why the costs should not be borne by the losing party, but it seems to us that this is a question to be decided by the court in charge of the interpleader proceedings. It does not appear that that court was ever asked to so order.

Ordered accordingly.

For plaintiff, *John Barton, Esq.*
Contra, *Messrs. Rodgers & Oliver.*

Orphans' Court.

In Re Estate of JAMES H. HAYS, Deceased.

Damages ascertained after the death of the owner of real estate, taken by a railroad before his death, are to be treated as personal estate of such decedent.

By the first clause of his will, Jas. H. Hays be directed that "in case of a deficiency of available personal property his executors should 'sell and convey so much of his real estate as shall be necessary' to make up such deficiency; 'but said power of sale to be exercised only in respect of my landings and marginal banks on the Monongahela after the other resources of my estate have become exhausted.'"

He excepted out of personal estate available for payment of debts his household furniture and movable property about his house which he gave to his wife.

He then devised and bequeathed the "residue and remainder" of his estate to his sons, H. B. and J. S. Hays, in trust, *inter alia*, to pay his widow an annuity of \$5,000 and provide her a dwelling, and "subject to the foregoing provisions," for and during the period of ten years after his decease, manage, control and lease his estate. "The net annual income and profits arising out of the execution of the last preceding clause, after all my debts and the annuity in favor of said wife shall have been paid or the payment thereof duly provided for, shall be divided" annually into eleven shares, and distributed amongst his children.

Some time prior to Mr. Hays' death, the Baltimore and Ohio Railroad had appropriated part of his marginal bank property, but no proceeding was instituted until after his death to ascertain the damage. The amount so ascertained was paid to the executors and has been charged in the present account of the trustee, as being part of the *corpus* of the estate. The personal estate being insufficient for the payment of debts, the executors appropriated part of the *income* of the realty thereto, and the children now claim the amount received from the railroad in relief of the income so taken.

Opinion by HAWKINS, P. J. Filed March 22, 1882.

The administration of this estate, as indicated by the will, resolves itself into two trusts: (1) that with reference to the creditors, and (2) that with reference to the beneficiaries of testator.

For the purpose of the first the testator divided his property into three classes and made these liable in the order following, viz:

a. His personal estate, excepting thereout his household furniture and moveable property, ordinarily used about his house, which he gave to his widow.

b. His real estate, excepting thereout,

c. His "landings and marginal banks on the Monongahela river."

For the purpose of the second, the "residue and remainder" of the estate left after the payment of debts and the delivery of the specific bequest to Mrs. Hays, was set apart in the trust for the widow and children.

The character of these trusts is perfectly distinct. The one is temporary; the other relatively continuous. The one was to collect and pay; the other was to hold and invest. There is nothing in the language of the will, except

for so far as relates to the power of sale of real estate and the order of appropriation of the proceeds of sale, which makes the duties of the executor toward creditors different from those of ordinary administration. In the absence of direction to the contrary, it must be assumed that the debts were payable out of the *corpus* of the estate. They were payable presently and the "residue and remainder" of the estate was to be ascertained by such payment. The will spoke from the death of the testator, not only with reference to the estate which was intended for creditors, but also with reference to the residuary estate. The "residue and remainder" could not be definitely ascertained, and the "net annual income" arising therefrom would be correspondingly uncertain, until "after the debts * * * shall have been paid, or the payment thereof duly provided for." There is no direction that the income itself shall be liable, except in this sense, for the payment of debts. Any other theory of construction would be inconsistent with the power to sell real estate, and the order of appropriation prescribed in the will, for payment of debts, and with the legal and technical signification of the expression "residue and remainder."

The question then is reduced to the character of the fund for distribution now before the court. Is it to be considered as constituting part of the personal property of decedent, or as representing "marginal bank property?" If the former, it is liable for the payment of decedent's debts; if the latter, it is exempt.

It seems to be settled that by the appropriation and use of land, under the railroad law, the title of the owner is divested and that of the railroad is created in the land so appropriated, and that all that is left to the former is his claim for compensation: *Moore v. Boston*, 8 Cush., 274. The right of the owner is a purely personal one, analogous to that of a vendor of unpaid purchase money, and consequently passes to his personal representatives: *Moore v. Boston*, *supra*; *Neel v. Railroad*, 61 Maine, 298; *Wells v. Cowles*, 4 Conn., 182; *Penn'a Railroad v. Cooper*, 8 P. F. S., 409; *Zimmerman v. Canal Co.*, 1 W. & S., 354; *McFadden v. Johnston*, 22 P. F. S., 335. It follows that the fund now for distribution is personal estate, applicable to the payment of debts in the first instance, and that it must be appropriated in relief of these to whom the "net annual income" was bequeathed, to the extent of such income diverted to payment of debts by the executors.

For accountant, *Thos. C. Lazear, Esq.*

For exceptants, *Messrs. D. T. Watson and W. F. McCook.*

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PITTSBURGH, PA., APRIL 12, 1882.

Supreme Court, Penn'a.

THE BEN FRANKLIN INSURANCE COMPANY, Defendant Below, v. JOHN FLYNN and G. S. HAMM.

The policy of insurance in this case required that notice of loss should be given "as soon as possible" after a fire. *Held*, that a delay of thirty days was not so unreasonable as to require the question of a compliance with the terms of the policy to be withdrawn from the jury and determined as a matter of law.

Where a forfeiture of a policy is to be worked by the breach of a collateral condition, such breach must be promptly taken advantage of. There must be nothing else alleged as a reason for non-payment.

A count in the declaration alleged a waiver of the requirements of the terms of the policy in reference to furnishing proofs of loss; there was a variance between the count and the proof offered; *held*, that as the *narr.*, without the special count, would have sustained the offer, the count must be treated as surplusage.

Error to the Court of Common Pleas of Clarion county.

Opinion by GORDON, J. Filed November 7, 1881.

There is very little, even of technical difficulty, in this case, and nothing at all of which the plaintiff ought to complain, if it looked to the justness of its obligation rather than for some loophole of escape from a debt which in all honor and honesty it ought to pay. The evidence furnishes not the slightest intimation that the plaintiffs were guilty of any kind of fraud either in intention or in fact. The loss occurred without fault or neglect on their part, and if there was any default in either the preliminary notice or statement of loss, it was of a character so technical that it could scarcely be avoided by any one not an expert. As to these, however, no exception is taken to the first; it is admitted that it was correct both in form and service, and as to the items of the other, the jury, under the instruction of the court, have found that they were as full and specific as they could be under the circumstances. But, *inter alia*, it is alleged that this statement was not forwarded to the company's office within the time required by the policy. The requisition is

that it shall be furnished as soon as possible after the fire.

But, as we held in the case of *The Home Insurance Co. v. Davis*, this phrase must be taken to mean within a reasonable time after the loss. The required statement was forwarded within thirty days from the date of the fire; we think a delay no greater than this not unreasonable, at least not so unreasonable as to require the question to be withdrawn from the jury and determined as a matter of law. The delay in the case cited was three months, yet, under the circumstances it was held that the submission of the question to the jury was proper.

But we have yet a couple of objections, still more technical in their character than the above, to dispose of:

(1.) It is required by the policy, that statement shall be made of any other insurance on the property and copies of the written parts of the policies set out in the proofs of loss. It is said that the latter part of this condition was not complied with. Taken literally this is true, but practically it is not true, for not only were the names of the several companies, the numbers of the policies and the amount by each one insured, given, but in addition it was stated that the written parts of these several policies were substantially the same as that of the Ben Franklin.

(2.) It is objected that the affidavit to the statement was not made before, and the certificate not made by a justice of the peace nearest the place of loss, but before and by a notary public some five or six miles distant therefrom.

The fire was at Turkey City, and the notary public lived at Edenburgh, the place of Hamm's residence, which circumstance accounts for his not complying literally with the prescribed condition. Were we called upon so to do, we might well say that both these conditions were substantially complied with, but as this whole matter was referred to the jury on the question of waiver, we are not required to pass upon a point of this kind. The counsel for the defense think the proofs of a waiver were not sufficient to warrant the court in so submitting them, but we are of a different opinion. These defects were, at best, but formal, and we incline to the opinion expressed by Mr. Justice SHARSWOOD, in *Beatty v. The Insurance Co.*, 16 P. F. S., 9, that it is the duty of the insurer, where the proofs of loss are put into its possession in time, to notify the insured of any formal defects which may be discovered therein, and have them corrected. From this it would follow that where this is neglected such defects must be regarded as waived.

Beyond this, however, the testimony of Dilworth, Ellis and Thorn was sufficient to establish a waiver of even more material defects. Where a forfeiture is to be worked by the breach of a collateral condition, such breach must be promptly taken advantage of; there must be nothing else alleged as a reason for non-payment, and especially must not the assured be led astray by propositions of settlement on grounds other than that of the alleged breach of the condition. But this is exactly what was done in this case.

The objection to payment was the compromise made with the Howard and other companies, and Riddle, the secretary of the company, proposed to pay on a similar basis or rate, which proposition was promptly accepted by the plaintiffs, and it was not till after this acceptance that there was any allusion to the defects in the statement of loss.

Even Riddle's letter of the 16th of October, enclosing blanks for corrected proofs, throws no light upon the defects of the former proofs, but only directs attention to those furnished to other companies, a direction which evidently looks more to the amounts for which those companies settled than to any particularity of items. It is, moreover, remarkable that at no time was there any special defect in the statement pointed out, or request made to have such defect corrected. But we need not go into the particulars of this testimony; there was enough of it to submit to the jury, and in so submitting it the learned judge was fully sustained by the cases of the *Lycoming Mutual Insurance Co. v. Schollenberger*, 8 Wr., 259; *The Inland Insurance Co. v. Stauffer*, 9 Ca., 297, and *The Home Insurance Co. v. Davis*, above cited.

Then we have an objection to the proofs offered to establish the waiver, for that the declaration alleges that waiver to have occurred in a manner different from that set forth in the offer of proof. But as the *narr.* without the special clause, the subject of controversy, would have sustained the offer, we may treat this part of it as surplusage.

We understand, indeed, that by the strict rules of pleading, if an allegation is made in the declaration which may be material in the trial, though immaterial in the pleadings, it must be proven as laid. But in our times the severe rules of pleading find but little encouragement, and even so far back as the case of *Repsher v. Shane*, 3 Yeates, 575, this doctrine of variance was not very strictly applied.

In this case the suit was on a promise of indemnity against the recovery of damages from the plaintiff by a third person in the declaration.

The amount of damages was laid at a certain sum, and on the trial the proof offered was of a different sum; yet the variance was held not to be fatal, though certainly in a case of this kind, accurate proof of the damages sustained by the plaintiff was material. Following in the track of this case of *Repsher v. Shane*, many latter cases have, like it, very much relaxed the strictness of the old doctrine of variance. Among these are *Grubb v. The Mahoning Nav. Co.*, 2 Har., 302; *Emerick v. Kroh, Id.*, 315, and *Filson v. Dunbar*, 2 Ca., 475. On the whole, therefore, we cannot say that even on this point the ruling of the court below was wrong.

Judgment affirmed.

For plaintiff in error, defendant below, *Messrs. Boggs & Weidner.*

Contra, W. L. Corbett, Esq.

WILLIAM RODDY'S APPEAL.

An appeal from a definitive decree of an inferior court is a matter of substance and must be taken in the manner and within the time prescribed by law.

The refusal of the application of an assignee to take off the confirmation of an auditor's report and of the assignee's account, so far as to permit a restatement of the account, is not reviewable in this court unless the petition of the assignee was in the nature of a bill of review.

As a general rule, a bill of review must be founded either on error in law, apparent on the record without the aid of extrinsic evidence, or on matters of fact *dehors* the record, which have arisen or been newly discovered since the decree, and could not, by the exercise of reasonable diligence, have been discovered before.

Facts found by an auditor or master and approved by the court will not be disturbed except for manifest error.

Error to the Court of Common Pleas of Somerset county.

Opinion by STERRETT, J. Filed November 7, 1881.

The Act of June 14, 1836, provides that any person aggrieved by the definitive decree or judgment of the Court of Common Pleas in any case relating to assignees for the benefit of creditors may appeal to this court within one year after such decree or judgment: *provided*, that in all cases the party appealing shall first give security, in such sum as the Court of Common Pleas shall direct, conditioned to prosecute such appeal with effect, and shall also make oath or affirmation that such appeal is not intended for delay: Purdon, 1420, pl. 36.

The account of appellant, as assignee of Nehemiah Miller and wife, was filed in June, 1878, and confirmed by the court. In November of the same year an auditor was appointed to distribute the balance in his hands, as shown by

the account. The schedule of distribution reported by him was confirmed in February, 1879. In August following, after creditors had applied to the court for attachment to compel payment of their distributive shares of the fund, the appellant presented his petition praying the court "to take off the confirmation of the auditor's report and the confirmation of his account so as to permit a restatement of said account in accordance with the" facts presented in the petition. After notice to those interested, the court appointed an auditor to take testimony, find the facts and report an opinion on the law. The facts found by the auditor were accordingly reported to the court together with his opinion "that the confirmation of the account * * * and the auditor's report thereon should not be taken off." Exceptions filed thereto were overruled and the report of the auditor was confirmed; whereupon, an appeal was taken by the assignee under the provisions of the act above referred to. The paper-book furnished no information as to what disposition was made of the appeal, but referring to the original record, brought up in the *certiorari*, we find that a judgment of *non pros* was duly entered by this court on October 25, 1880, and a *remittitur* filed in the court below. Ordinarily this would be regarded as the end of that appeal, but the party complaining appears to have thought otherwise, and has again brought before us the same record without having renewed his appeal and without having given security as required by the act. It is scarcely necessary to say that there is neither precedent nor authority for such a proceeding. Mere matters of form may sometimes be dispensed with, but an appeal from the definitive decree of an inferior court is a matter of substance, and must be taken in the manner and within the time prescribed by law. This has not been done. We have been asked to quash the appeal, but there is nothing upon which such a judgment can operate. The only office of a *certiorari*, in such cases as this, is to bring up the record after an appeal has been duly entered. Inasmuch as there was no appeal pending in this case the writ was improvidently issued, and should therefore be quashed.

But, in view of the facts that the case was argued at length on the merits, as though an appeal were pending, we have examined the record and find no error therein.

The petition to the court below is so drawn as to render it doubtful whether it was intended as a bill of review or merely an application for a rehearing. If the latter, the action of the court thereon is not reviewable here. It is only by treating the petition as a bill of review that

the assignee could have any standing in this court. As a general rule, a bill of review must be founded either on error in law, apparent on the record without the aid of extrinsic evidence, or on matters of fact *dehors* the record, which have arisen or been newly discovered since the decree, and could not, by the exercise of reasonable diligence, have been discovered before. It is not pretended there is any error apparent on the face of the assignee's account, or in the report of the auditor distributing the fund. The application is grounded solely on the allegation that "since the filing of his account and the auditor's report thereon such a new state of facts has arisen that should entitle" him to equitable relief. After stating that he had deposited the proceeds of his assignors' real estate in the banking-house of J. O. Kimmel & Sons, for safe keeping, and that he considered it a safe depositing, etc., he says, "that since his account was made out and confirmed J. O. Kimmel individually and J. O. Kimmel & Sons have made an assignment for the benefit of their creditors and that their estate will not pay their debts." This is the only "new state of facts" of which any mention is made in the petition. The extent of the bankers' insolvency is not stated, and no particulars in regard thereto are given. Whether such newly discovered facts are sufficient to justify the granting of the relief asked for, is more than doubtful; but, waiving the insufficiency of the petition, both as to form and substance, and recognizing the authority of a line of cases which limit the liability of trustees, we are of opinion, that upon the facts found by the auditor and conclusions drawn therefrom, all of which were approved by the court, the learned judge of the Common Pleas was clearly right in refusing to take off the confirmation, either of the assignee's account or the auditor's report.

The subjects of complaint in the first five assignments are, the refusal of the court to sustain exceptions to the auditors finding of facts and the inferences drawn by him therefrom. As to the former, the settled rule is that facts found by an auditor or master and approved by the court will not be disturbed except for manifest error. There was no such error in this case. On the contrary, the auditor was fully warranted not only in finding the facts as he did, but his inferences therefrom are substantially correct.

The fund deposited was the proceeds of the assignors' real estate, sold by order of court divested of liens. One of the creditors, whose liens were thus divested, was George J. Black who held judgments for purchase money, first

liens on the property, amounting, as the assignee himself says, "to about two-thirds of the whole fund." There was no possible excuse for the non-payment of that amount. The law, relating to sales by assignees divested of liens, expressly directs the application of the proceeds to payment of liens extinguished by virtue of such sale, and the assignee is required to give bond conditioned for the faithful appropriation of the money: Purdon, 1973, pl. 1. The right of Mr. Black, as the first lien creditor, to two-thirds of the fund was conceded, and it was the clear duty of the assignee to pay as soon as he received the purchase money. If he had done so the amount remaining would have been comparatively small. There was no necessity for depositing money in bank, which should have been forthwith paid to those whose liens were divested by the sale, and permitting it to remain there for months. The excuse given by the assignee for not paying out the money to recognized lien creditors was, that his attorney advised him that he could not safely pay until the fund was distributed by an auditor. In this he is not borne out by the testimony of his attorney, Mr. Kimmel. He testified that he told the assignee it was better not to pay out any money until an auditor was appointed to make distribution, "except where he knew it would be safe to pay, where he knew it would be allowed." They both knew that nearly the whole fund could have been safely paid. Sometime after the money was deposited they did pay Mr. Black \$1,000 on account of his extinguished liens, and it would have been equally safe to have paid the whole of it at an earlier date.

For these and other reasons given by the auditor, and concurred in by the court below, we think the relief prayed for was rightly refused.

But, for the reason heretofore given, we can do nothing more than quash the writ on which the record was brought before us.

Writ of certiorari quashed.

For appellant, *Messrs. John R. Edie, J. S. Ferguson and John D. Roddy.*

Contra, W. H. Kountz, Esq.

N. J. KELLER, for use, v. THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

KELLER'S APPEAL.

The owner of land, at the time a railroad is built thereon, is the party entitled to the damages for the taking of the land, subject to the rights of mortgagees and other lien creditors.

Error to the Court of Common Pleas, No. 1, and appeal from same court of Allegheny county.

N. J. Keller and P. M. Pfeil, on October 15, 1875, purchased from J. Keeling a lot of ground, in the Twenty-fifth ward, Pittsburgh, giving a mortgage for \$5,000, the unpaid purchase money. This mortgage was assigned to Hussey & Co. in part payment for this very land previously sold by Hussey & Co. to Keeling. Afterwards, and before Hussey & Co. had purchased the mortgage assigned to them by Keeling, the Pittsburgh & Lake Erie Railroad Company appropriated a portion of the land to its use, thereby impairing its value and lessening the security of the mortgage.

Viewers were appointed under the Act of 19th February, 1849, to assess damages, and on March 29, 1881, estimated the damages at \$1,260. Hussey & Co. foreclosed their mortgage and the sheriff sold the property in December, 1880, for a sum which failed to pay the debt by \$763.

Keller, for use of Jane Hawley, owned the property at the time the railroad took possession, and February 19, 1881, presented a petition for the viewers, but before return was made, Hussey & Co., on petition setting forth that a balance remained on the purchase money mortgage were allowed by the court to intervene and claimed the above balance of \$763 out of the fund upon report of the viewers, setting forth the above facts, the court filed an opinion and made an order as follows: We think the damages should have been awarded by the viewers in their report to the owner of the land at the time the railroad company took possession, for use of such persons as were in equity entitled thereto, the first of whom is the assignee of the Keeling mortgage, and after this is paid then the assignee of said owner is entitled to the residue.

It is, therefore, ordered that judgment now be entered on the award of damages returned by the viewers in favor of N. J. Keller, the plaintiff, and the same be marked first for the use of C. G. Hussey & Co., and then the residue for the use of Jane Hawley.

Keller took this appeal, setting forth the following assignments of error: The court erred in awarding the mortgagee for use any part of the fund in this case.

The court erred in not awarding the whole amount, to wit, \$1,260 to Jane Hawley, the assignee of N. Keller.

The opinion and the judgment of the court below in this case is erroneous.

For plaintiff in error, *W. C. Erskine, Esq.*
Contra, Samuel Palmer, Esq.

PER CURIAM. Filed October 24, 1881.

It is well settled that the owner of the land at the time the road is taken, is the party entitled

to recover damages for the taking, but it is the duty of the court to protect the rights of mortgagees and other lien creditors. All parties succeeding to the title, legal or equitable of any of these parties, must take subject to their rights at the time of the taking. The order of the court below was entirely right.

Order affirmed.

District Court, United States.

Western District of Pennsylvania.

IN BANKRUPTCY.

In Re H. CLAY MINOR and ALBERT B. MINOR,
Partners as H. CLAY MINOR & SON, Bankrupts.

A father formed a mercantile copartnership with an infant son, in his twentieth year, the father contributing his stock of merchandise and some book accounts, and the son his time and services, each to have a half interest. Thenceforth the business was conducted in the name of and by the firm openly and notoriously, and with the knowledge of the father's individual creditors, for more than a year, during which time the old stock was disposed of and a new stock bought by the firm very largely on credit. One of the old individual creditors of the father then levied upon the new stock, whereupon the partners upon their joint petition (which did not disclose the son's infancy) were adjudged bankrupts. The transaction between father and son was free from actual fraud, but the register in bankruptcy found it was constructively fraudulent as to the father's then creditors, because, after deducting the value of the partnership interest the son acquired, the remaining property of the father was insufficient to pay his debts:

Held, that, however, it might have been with respect to the original stock of goods, the new acquisitions of the firm could not be seized by the father's creditors, but must be treated as firm property and the proceeds applied to firm debts.

Sur register's report as to liens on goods, etc.

Opinion by ACHESON, D. J. Filed April 8, 1882.

On July 1, 1876, H. Clay Minor and Albert B. Minor, partners doing business at Waynesburg, in Greene county, in the firm name of H. Clay Minor & Son, were adjudged bankrupts upon their joint petition, filed June 29, 1876. The firm had at their store-room a stock of miscellaneous merchandise, which on June 19, 1876, had been levied on by the sheriff of Greene county upon a *feri facias* that day issued *sur* judgment of B. F. Flenniken, for use, *v. H. Clay Minor and K. J. Brant*, and also levied on by virtue of several subsequent executions against H. Clay Minor. All these executions were upon judgments for individual debts of H. Clay Minor. This court having enjoined the sale of said stock under said executions, the goods came into the

hands of the assignee in bankruptcy who sold them. Afterwards, upon the petition of K. J. Brant, who was surety for H. Clay Minor in the first mentioned judgment and to whom the plaintiff therein had assigned his rights, the case was referred to the register to ascertain if said stock of goods was subject to any liens, etc. Recently the register filed his report from which it appears that the net fund realized from the sale of said stock of goods was \$1,021.39, the whole of which the register awarded to Brant. To this report the partnership creditors have excepted. The contest, therefore, is between Brant, the individual creditor of H. Clay Minor, and the partnership creditors of the bankrupts, who, *prima facie*, are entitled to the proceeds of the firm stock, not only on general principles, but by the express provisions of Section 5121, Revised Statutes. To understand the reasons which controlled the register it will be necessary to recite the material facts.

About May 1, 1875, H. Clay Minor, who had theretofore carried on the business of merchandising, formed a copartnership with his son, Albert B. Minor, who was then in his twentieth year. The father put into the firm his stock of merchandise, estimated as worth \$2,000, together with his book accounts, amounting, nominally, to about \$3,000. The son's contribution to the partnership consisted of his time and services. The father and son were to have equal interests in the concern. Immediate notice of the formation of the copartnership was given by advertisement in all the local newspapers, and it was well known. The transaction had the utmost publicity, and the individual creditors of H. Clay Minor, who have made claim to the fund in dispute, undoubtedly soon knew of the formation of the firm. Thereafter all purchases were made by the firm, the goods billed and shipped to them, and the whole business conducted in the name of and by the firm. The evidence (including the schedules in bankruptcy) establishes that at the date of the bankruptcy the firm were indebted to divers creditors (the exceptants) to the amount of about \$3,000, all of which debts were incurred after November, 1875, and a large proportion thereof in the spring of 1876. It fairly appears from the evidence that the stock of goods on hand at the time of the sheriff's levy consisted almost wholly of new purchases recently made by the firm. Substantially it was a new stock of goods and had been bought very largely on credit. Some of these unpaid for goods reached the store after the levy and went into the stock.

At the date of the formation of the partner-

ship B. F. Flenniken held the individual note of H. Clay Minor for \$2,000. Upon the last renewal of this note, on January 31, 1876, Brant became surety thereon. That note matured April 1st, judgment thereon was entered June 14th, and execution, at Brant's instance, issued June 19, 1876. Brant settled with the plaintiff and took an assignment of his rights after the sheriff's sale was enjoined.

The register, as I understand his report, concedes that the partnership between H. Clay Minor and Albert B. Minor was entered into in good faith and without any covinous intent toward creditors. The evidence warrants such finding. Indeed, so far as I can discern, the transaction was absolutely free from the taint of actual fraud. But the register (by a rather close calculation) finds that after deducting the value of the interest, which Albert B. Minor acquired under the partnership agreement, the property, real and personal, remaining to H. Clay Minor was insufficient to pay his then debts. If this finding be accepted as correct, it must, I think, also be said that there is not a particle of evidence that H. Clay Minor then contemplated insolvency or foresaw it; nor does it appear that the inadequacy of his remaining property to pay his debts was then comprehended, either by himself or Albert. The register, however, held that the partnership was constructively fraudulent as respects the then existing creditors of H. Clay Minor; as against whom, therefore, he decided there were no equities as between the partners of which the firm creditors could avail themselves in the present contest; and, hence, he concluded that the Flenniken execution must prevail. The register applied to the case the principle that it is the equity between the partners themselves which governs in the distribution of partnership assets, and not the mere rights of creditors. His views are ably presented in his report; nevertheless his conclusion strikes me as unjust to the firm creditors, and I am unable to adopt it.

The register regarded the transaction as a voluntary settlement by H. Clay Minor upon his son. He treated the case as one of pure gift, entirely eliminating from it the element of contract. Because a father is entitled to the services of his infant son, the register held that there was no consideration moving from the son to sustain the partnership as against the father's creditors. Perhaps in this deduction the register is right if we confine our attention to the original contract, although even then something is to be said in favor of the contrary view. A father may emancipate his infant son and permit him to enter into contracts in his own

behalf for service: *McCloskey v. Cyphert*, 27 Pa. St., 230; *Wodell v. Coggeshall*, 12 Met., 91. And as an infant may enter into a contract of partnership (Collyer on Partnership, Section 13), the contract here worked the emancipation of the son. That the arrangement was necessarily prejudicial to the father's creditors is an unwarrantable assumption. Stimulating the energies of the son and calling forth his business talents and capacity, it might well have resulted to the great financial advantage of the father. Had the latter acting in good faith entered into the same agreement with a stranger—adult or infant—it surely could not have been pronounced constructively fraudulent. Why then, it may be asked with some reason, should the contract with the son be so stigmatized? But in the view I take of the case it is not necessary to decide whether or not upon this point the register was right.

In my judgment the case does not turn on the question whether the contract of partnership was not originally avoidable by the father's creditors? If it be conceded that they might have seized the original stock of goods as his property, it by no means follows that they had the right so to deal with the stock of goods on hand on June 19, 1876. Flenniken, upon whose rights Brant must stand (for by virtue merely of his suretyship he is a subsequent creditor), renewed his note long after the formation of the firm and when he must have known of its existence. In common with the other individual creditors of H. Clay Minor he stood by without objection for more than a year while the firm openly and notoriously traded with the world. In the meantime the original stock of merchandise was disposed of and new purchases were made by the firm. Nor was the old stock simply transmuted into new. The goods which came into the hands of the assignee in bankruptcy were bought largely on credit—bought too from these exceptants or some of them. The real question then is, whether under all the circumstances the partnership creditors are not equitably entitled to have these new acquisitions or their proceeds applied to the firm debts? I am of opinion that they are so entitled. Bought and held by the firm, these goods, as between the partners themselves, and as between them and the firm creditors, undoubtedly were partnership property, and I see no just reason why, in favor of the individual creditors of H. Clay Minor, they should be otherwise treated.

It lies not in the mouth of Brant or his assignor to say that Albert B. Minor has no equities of which the firm creditors may avail

themselves. Certainly his infancy is his personal privilege which a stranger may not set up. The partnership creditors when they dealt with the firm had a right to suppose he was of full age, and I should be very loath to admit that he could, if so disposed, by pleading his infancy, deprive them of their derivative equities to have the firm assets applied to the firm debts. (See *Backus v. Murphy*, 39 Pa. St., 402; *Ex parte Watson*, 16 Ves., 285.) But he attempts nothing of the kind. On the contrary, moved by equitable considerations and to secure fair play—without disclosing his infancy to the court—he had himself adjudged a bankrupt conjointly with his partner. The case then being one for the equitable marshalling of assets the preference which the register gave to the Flenniken execution must be disallowed.

And now, April 8, 1882, the exceptions of the partnership creditors are sustained and the register's distribution is set aside.

By the Court.

For exceptants, Messrs. J. P. Teagarden, C. A. Black and J. B. Donley.

Contra, Messrs. Wiley, Buchanan & Walton.

Court of Common Pleas, No. 2.

RICHARD ROE v. MARY ROE.

- (1.) In the interpretation and administration of the statute laws on divorce, the courts of the United States have to a great extent adopted the practice of the English ecclesiastical courts on the same subject.
- (2.) To entitle a libellant to a decree of divorce on the ground of impotency of the respondent, it must be alleged in the libel, and be proven by the testimony, that the impotence is incurable.
- (3.) A failure to allege in the libel that the impotence is incurable is ground of demurrer.

Opinion by EWING, P. J. Filed November 12, 1881.

The libel in this case is drawn in very brief terms. It does not give the age of either party. From his statement in another paper in the case it appears that the libellant has been a grandfather for five years, and that he is seriously affected with rheumatism, and it would appear from an affidavit of respondent that she is no longer young. The libel does not aver any cohabitation or attempt to cohabit.

As the ground for divorce it alleges "that at the time of entering into the marriage contract, the respondent (the wife) was and still is naturally impotent and incapable of procreation, and by reason of the malformation of the sexual

organs was and is under a natural incapacity of discharging her matrimonial vow."

The demurrer is general, to wit, that "the libel is not sufficient in law."

The marriage was contracted 13th September, 1876. The libel was filed 21st March, 1881.

The ground of demurrer is that the libel does not allege the impotency or malformation to be incurable. Is that an essential allegation?

Counsel for libellant contend that they are not bound to either allege or prove incurability. That it is sufficient to prove that impotency existed at the time of the contract of marriage and still exists to entitle the libellant to a divorce, even though it be proven that the defect is curable or has been cured since filing the libel.

The words of the statute are, "was and still is naturally impotent or incapable of procreation." What is the meaning? Taken literally, the word "naturally" would exclude an impotency caused by an injury after birth. Yet it certainly does not exclude such a case. While the law of divorce in this and the other States is founded on statute, yet in the administration, our courts adopt largely the law of the English ecclesiastical courts: Bishop on Divorce, Vol. I, Sec. 71; *Butler v. Butler*, 1 Parson's Eq., 337; *Clark v. Clark*, 6 S. & R., 86; 5 Paige, 557; 5 Foster (N. H.), 267; 1 John Chan., 488. The uniform ruling of the English courts has been that the impotency must be incurable and that it must be proven affirmatively to be so. The same interpretation has been given to the same and similar words to those of our statute in the courts in this country, in every case in which the question has been raised, so far as we have been able to examine the cases: *Ferris v. Ferris*, 8 Conn., 166; *Kempf v. Kempf*, 34 Mo., 211; *Devenaugh v. Devenaugh*, 5 Paige (N. Y.), 557. If this were not the true interpretation of the statute it would follow that a divorce could be demanded in every case where a slight malformation existed—impeding the immediate consummation of the marriage contract—although such impediment was till then unknown, and might be removed by an easy surgical operation. From examination of medical authorities, we are safe in assuming that in the present state of medical and surgical skill, the presumptions are that impotency or malformation in the sexual organs of a woman is ordinarily curable. On authority and reason we have no doubt that our statute means incurable impotency.

Must incurability be alleged in the libel, or is it sufficient that it be proven without being specifically alleged? With the aid of diligent counsel we are unable to find any Pennsylvania

authority on either branch of our subject. The second Section of our Act of Assembly of 13th March, 1815, regulating proceedings in divorce, directs that "the libellant shall set forth *particularly and specially* the causes of his or her complaint."

It is not always safe pleading to set forth the complaint in the words of the statute. Every material allegation should be set out unequivocally, and if a word or phrase has different meanings it should appear either directly or by the context, in what sense the pleader uses it. Adultery is a ground for divorce, but it is necessary to either specify the paramour or state that he is unknown. That the marriage was procured by "fraud, force and coercion" is ground for divorce, but it is not sufficient to set forth in the libel that the marriage was so procured. The circumstances must be particularly set forth: *Hoffman v. Hoffman*, 6 Casey, 417. Pleadings should be so accurate and unequivocal that when they are required to be verified by oath a conviction for perjury might follow a false oath. The Act of Assembly requires the libellant to make oath that "the facts set forth in his libel are true." If it should turn out that the libellant in this case knew that the impotency was curable when he made his affidavit, he could not be convicted of perjury, because he speaks of impotency in the common sense and not in the statutory sense.

As said by Judge THOMPSON, in *Hoffman v. Hoffman*, above cited, "It advances not the morals of society to treat lightly or loosely the obligations of the matrimonial contract. Courts ought to be careful to see that all the requirements of the law in such proceedings be complied with, both as to *form and substance*, so that divorces may not be obtained through fraud or collusion."

We are not called on to decide a case where no question is raised on the pleadings *in limine*. Due proof and finding of the facts by the court might be sufficient after testimony taken in the case. In such cases as the present, the proceedings for proof are of such a character as to be taken only when good cause may be shown. A corporal examination by an expert is usually necessary. Neither public nor private morals are to be advanced by proceeding to such examinations and testimony—when from all that appears affirmatively on the pleadings, the presumptions are that it will result in nothing more than scandal and uncalled for exposure of personal defects.

The weight of authority is also on the side of the demurrer. The English authorities are uniform in holding that incurability must be

alleged and proved. Mr. Bishop says (Vol. II, p. 576), that he has never seen an English precedent that did not set forth that the defect was incurable. The only American case that we have found to the contrary is that of *Kempf v. Kempf*, *supra*, in which the court held it unnecessary to allege in the bill that the impotency was incurable; that as the impotency intended by the statute is incurable, the libellant would be supposed to use the word in that sense. No counsel appeared for the respondent, and the learned judge appears to have ignored all the precedents in such cases. There is also this difference, that the provision of our statute, requiring the libellant to set forth particularly and specially the ground of his complaint, is entirely lacking in the Missouri Statute.

In *Devenaugh v. Devenaugh*, 5 Paige, 577, the bill set out the physical incapacity of the respondent without, in terms asserting its incurability (though it may be inferred from the whole bill). The bill had been taken *pro confesso*. No question was raised on the pleadings, nor could there well be at that stage of the case. No counsel appeared for the respondent, but Chancellor WALWORTH refused to grant a divorce on the ground that there was no affirmative proof that the incapacity was incurable, holding, that although the statute did not in words demand that it should be incurable, yet that it must be interpreted in the light of the well known rulings of the English courts. And further saying, "impotency on part of a female, that cannot be cured by proper medical or surgical treatment, is a case of very rare occurrence." The case was referred to a master for proofs, and was finally refused, because the proof did not show the defect to be incurable: 6 Paige.

In *Ferris v. Ferris*, 8 Conn., 116, the point is raised, and in a well considered opinion squarely decided that the libel must allege that the impotency is incurable. A demurrer to the bill was sustained for the failure to so allege.

We prefer to follow in the interpretation of our Act of Assembly the precedents which are most likely to avoid unnecessary scandal, and which is also in our opinion the correct interpretation, and require the libellant to set forth unequivocally and specially the ground of his complaint.

The demurrer is sustained, with leave, however, to the libellant to amend within sixty days.

For plaintiff, *Messrs. R. E. Stewart and S. Schoyer, Jr.*

Contra, Magnus Pfaffm, Esq.

[Libel amended accordingly, answer filed and commissioner appointed.—ED.]

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Supreme Court, Penn'a.

**MICHAEL CLOHESSEY, Defendant Below, v.
ROEDELHEIM, BING & CO.**

The penalty of the Act of 29th March, 1860, *Purd.*, 949, pl. 61, in relation to the adulteration of liquors, is aimed at such impurity, vitiation or adulteration of liquors or admixtures thereof, as impairs either their quality or value.

To defeat the right to recover for liquors sold to a person residing in a county where the prohibitory law is in force, it is incumbent on the defendant to prove a sale consummated by delivery in that county—such a sale as would render the vendor amenable to indictment there.

Garbrachl v. Commonwealth, 28 PITTSBURGH LEGAL JOURNAL, 220, approved and followed.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action in the court below by Roedelheim, Bing & Co., wholesale liquor dealers in the city of Pittsburgh, against Michael Clohessey, a hotel keeper, at Irwin, Westmoreland county, to recover for liquors sold him.

At the trial Clohessey defended on the ground that the liquors were impure, and that a special prohibitory law was in force in Westmoreland county, where it was claimed the contract of sale and the delivery were made. The first branch of the defense was interposed under the following Acts of Assembly: "In all actions for the sale of any spirituous, vinous or malt liquors, or any admixture thereof, it shall be competent for the defendant, in every such case, to prove that said liquors or admixtures thereof were impure, vitiated or adulterated; and proof thereof being made, shall amount to a good and legal defense to the whole of the plaintiff's demand:" Act 29th March, 1860; *Brightly's Purdon*, Vol. II, Sec. 61, page 949.

"No action shall be maintained, or recovery had in any case for the value of liquors sold in violation of this or any other act; and defense may be taken in any case against such recovery without special plea or notice:" Act of May 8, 1854; *Brightly's Purdon*, Vol. II, Sec. 62, page 949.

The first two assignments of error are given in full in the opinion, *infra*. The other assignments noticed are:

3. In refusing defendant's fifth point: "5th. That if the jury find that the contract of sale and purchase was made in the county of Westmoreland, while the local option law, which prohibited the sale of intoxicating liquors in that county, was in force, and in violation thereof, the plaintiffs cannot recover."

4. In refusing defendant's seventh point: "7th. That if the jury believe the testimony of the plaintiffs themselves, that the liquors were shipped in their own names to Larimer or any other point in the county of Westmoreland, and that the goods were then delivered to the defendant in violation of the local option then in force, the plaintiffs cannot recover."

"Answer.—Refused. The plaintiffs expressly deny that they delivered the goods to the defendant in Westmoreland county."

5. In refusing defendant's eighth point: "8th. That if the jury find from the facts as stated by the plaintiffs, that the liquors were shipped to any point within the county of Westmoreland, in the plaintiffs' names, and that the plaintiffs authorized the delivery to defendant in the county of Westmoreland at the request of defendant, to knowingly aid him to evade the prohibitory law then in force in that county, then and in such case the plaintiffs cannot recover."

6. In refusing defendant's ninth point: "9th. That if the jury find from the evidence that the plaintiffs in the sale and delivery of the liquors sued for knowingly aided and abetted the defendant in any way to evade or violate the liquor law then in force in the county of Westmoreland, then and in such case the plaintiffs cannot recover."

For plaintiff in error, defendant below, *Messrs. Weir & Gibson and Chas. F. McKenna*.
Contra, Josiah Cohen, Esq.

Opinion by STERRETT, J. Filed November 14, 1881.

One of the several defenses made in the court below was grounded on the Act of 29th March, 1860, which, *inter alia*, provides that, "In all actions for the sale of any spirituous, vinous or malt liquors, or any admixtures thereof, it shall be competent for the defendant, in every such case, to prove that said liquors or admixtures thereof were impure, vitiated or adulterated; and proof thereof being made shall amount to a good and legal defense to the whole of the plaintiffs' demand:" *Purd.*, 949, pl. 61.

Testimony was introduced by the defendant below tending to prove that at least some of the liquors purchased from the plaintiffs were of the character described in the act; and, in the

two points, covered by the first and second assignments of error, respectively, the court was requested to charge: 1st. "That any impurity, vitiation or adulteration, to the least extent, would fall within the meaning of the law which prohibits a recovery for such liquors; therefore, if the jury find from the evidence that there was the least impurity, vitiation or adulteration, their verdict should be for the defendant." 2d. "That the term impure means the introduction of any substance, foreign to and not essential in the manufacture of pure liquors. Therefore, if the jury find that the liquors sued for contained any impurity the plaintiffs cannot recover." The latter proposition was refused; and, in answer to the first, the learned judge instructed the jury that if they believed "there was any impurity, vitiation or adulteration which impaired the quality or value of any of the liquors in suit, to the least extent, the plaintiffs cannot recover for the liquors so impaired." In view of the mischief intended to be remedied by the act, we think the construction given to it, in the foregoing answer, in connection with the general charge, is entirely proper. The act was not intended to prevent every admixture of liquors, for by its very terms "admixtures thereof" are recognized. The penalty of the act is aimed at such impurity, vitiation or adulteration of liquors or admixtures thereof as impairs either their quality or value. This of course forbids the introduction of all poisonous or noxious ingredients, because these necessarily impair the quality, if not also the value of the liquor. The amount found by the jury, as compared with the plaintiffs' demand, indicates that, under this branch of the defense, part of their claim was excluded by the jury.

Another ground of defense was, that the liquors were sold and delivered by plaintiffs to defendant in Westmoreland county, in violation of the local option law then in force in that county. On that subject the testimony was somewhat conflicting, and it was therefore a question of fact for the jury, whether the sale was consummated by delivery in Allegheny or in Westmoreland county. That question was fairly submitted with proper instructions as to what constituted a sale; and the jury were told that if they believed the liquors were sold in Westmoreland county their verdict should be for the defendant. In addition to the instruction thus given in the general charge, two of the plaintiffs' propositions complained of in the last two assignments were affirmed. In each of these an important phase of the question, as suggested by the testimony, was clearly and correctly presented and there was no error in

affirming them. The verdict rendered under the full and explicit instructions thus given in the general charge, and in answer to the plaintiffs' eighth and ninth points above referred to, establishes the fact that the sale was made in Allegheny county where the local option law was not in force.

The third assignment is not sustained. It was not enough for defendant to show that an agreement or contract to sell was made in Westmoreland county. Before he could claim that plaintiffs had forfeited their right to recover the price of their goods, in consequence of having sold them in Westmoreland county contrary to law, it was incumbent on him to prove a sale consummated by delivery in that county—such a sale as would render them amenable to indictment there. As already observed, the instructions on this subject were clear and adequate. The point, as presented, was rightly refused: *Garbracht v. Commonwealth*, 28 PITTSBURGH LEGAL JOURNAL, 220.

For the reason given by the learned judge, there was no error in refusing to affirm the point specified in the fourth assignment. It improperly assumed, as a conceded fact, that the liquors were delivered by the plaintiffs below in Westmoreland county. This they expressly denied, and it thus became one of the main questions of fact for the jury.

The fifth and sixth assignments are not sustained. The propositions, recited therein and which the court refused to affirm, are based on the testimony as to an understanding between the parties in pursuance of which the goods, purchased by defendant below, were marked, "R. & B." and shipped to Westmoreland county, so that his name would not appear as consignee, etc. If the sale was actually made in Pittsburgh, neither the manner in which the goods were consigned to the purchaser, nor the purpose for which they were thus consigned, could possibly change the place of sale and delivery. Assuming it to be true that they were marked and shipped in the manner and for the purpose testified to by the defendant below, the plaintiffs in so doing violated no law. If they sold and delivered the liquors to him at Pittsburgh, as the jury found, they had an undoubted right to mark and ship them to him in any manner he might direct. To hold that by so doing they knowingly aided him to evade or violate the liquor law, then in force in Westmoreland county, would be wholly unwarranted. Aside from the defense based on the Act of 1860, the only question that could legitimately arise on the evidence in the case was whether the sale was consummated by delivery in Allegheny or

in Westmoreland county. That question, as we have seen, was fairly submitted to the jury and found in favor of the plaintiffs below.

Judgment affirmed.

SHARSWOOD, C. J., dissents.

JOHN MORTON et ux., Defendants Below, v.
PETER S. WEAVER.

Where a creditor obtains judgment against the administrator of a married woman for necessities obtained by her, and upon such judgment issues a *scire facias*, bringing in the husband and heirs, and upon execution issued on the judgment obtained on the *scire facias*, purchases real estate, the title to which was in the married woman at the time of her death, it is held in an ejectment brought by the purchaser and plaintiff in the judgments to recover the property purchased, that the judgments appearing regular upon their face could not be attacked in the latter proceeding for matters *dehors* the record.

It is not enough to charge fraud and prove in support thereof slight circumstances of suspicion only. To be of any avail it must be clearly proved.

Error to the Court of Common Pleas of Armstrong county.

This was an action of ejectment brought by the assignee in bankruptcy of Peter S. Weaver to recover possession of two lots of ground in Freeport, Armstrong county, in the possession of Nancy Morton.

Peter S. Weaver brought suit against the administrator of Helen Johnston for necessities obtained by her during her lifetime and while *feme covert*. By order of court the surviving husband was joined as defendant and judgment was obtained against the administrator by default. Upon this judgment a *scire facias* was issued in which the husband and three children of Helen Johnston were brought in. One heir, Hess Johnston, a grandson of Helen Johnston and a son of Nancy Morton, was overlooked. The *scire facias* was brought to issue and arbitrated, the award being in favor of the plaintiff, from which no appeal was taken. Upon the judgment obtained in the *scire facias*, execution was issued and the property in controversy was bought in by Peter S. Weaver. The title to the property was in Helen Johnston absolutely at the time of her death, and both parties in this action claimed through her. Nancy Morton was the wife of Joseph Johnston, a son of Helen Johnston, who died, leaving survive him Nancy Morton and a son, Hess Johnston, who also died before the bringing of this action.

The plaintiff below offered in evidence the record of the original judgment against the administrator of Helen Johnston, which was objected to, because Helen Johnston was *feme covert* when the goods were alleged to have

been obtained and her husband was alleged not to have been properly joined; that some of the goods did not appear to be necessities, and therefore the judgment was void.

The plaintiff then offered the record of the *scire facias*, which was objected to, because the original judgment being void the *scire facias* must fall with it.

The plaintiff then offered the sheriff's deed, which was objected to, for substantially the same reasons as stated in the objections to the admission of the two judgments.

All these foregoing offers were admitted and their admission found the subject of the first three assignments of error.

The defendants below defended upon the ground that Weaver had been appointed as the agent of Helen Johnston to rent the property and apply the rent to the payment of his debt, that he had in this manner been overpaid, and that he had acted fraudulently in obtaining judgment and purchasing this property.

To prove these allegations, Nancy Morton was offered as a witness and objected to, because she was incompetent and the allegations sought to be established were irrelevant, having been adjudicated in the proceeding upon the *scire facias*. These objections were sustained and constituted the fourth and fifth specifications of error by the defendant below.

What evidence of fraud was offered and admitted does not very clearly appear in the paper-books, excepting that Weaver admitted to third persons that he had acted as agent of Mrs. Johnston and was to be made whole out of the rents, together with some evidence as to the amount of rent collected. The court below, however, held that the judgment upon the *scire facias* was conclusive upon all the heirs served, and directed the jury that their verdict should be for the plaintiff below for three-fourths of the land described in the writ, and as to the remaining one-fourth, their verdict should be for the defendant, Nancy Morton.

This action of the court in taking the question of fraud from the jury embraced the other five specifications of error and were presented by the defendant's points and exceptions to the charge of the court.

For plaintiffs in error, defendants below, David Barclay, Esq.

Contra, Messrs. E. S. Golden and Joseph Buffington.

Opinion by STERRETT, J. Filed November 7, 1881.

The plaintiff below claimed under Mrs. Helen Johnston, who formerly owned the lots in con-

troversey, and died seized thereof in 1859, and, for the purpose of tracing title to himself, he gave in evidence the record of a judgment rendered June 10, 1863, in his favor against James Cunningham, administrator of Mrs. Johnston, and also the record of a *scire facias* thereon to September Term, 1863 with notice to the husband and all the heirs at law of the decedent, except one, as to whose interest he was not permitted to recover. In the latter proceeding, judgment was entered, November 8, 1865, on an award of arbitrators for \$1,417.34, and by virtue of an execution based thereon the lots in controversy were sold by the sheriff and conveyed to Weaver, the plaintiff below.

The admission of the records and sheriff's deed aforesaid forms each a separate subject of complaint in the first, second and third assignments respectively.

The record of the original judgment exhibits a suit regularly brought against the personal representative of Mrs. Johnston for necessities sold to her when a *feme covert*, for the use of herself and family "at her special instance and request, and upon her own responsibility, promise and engagement to pay." The probated copy of book account, with the exception of a few items, is composed of articles that may fairly be classed as necessities, and the claim, as shown by the record, is quite sufficient in form to charge the separate estate of a married woman. By order of court the surviving husband was added as a defendant, but the judgment, in default of a plea, was rendered against the administrator alone. There is nothing, whatever, upon the face of the record to impeach either the regularity or validity of the judgment, and there was, therefore, no error in admitting it in evidence as the foundation of the subsequent proceedings.

In the *scire facias* to bring in the heirs, we fail to discover any irregularity in the proceedings of which the plaintiffs in error have any reason to complain. One of the heirs, it is true, was omitted, but that has inured to their benefit by limiting the recovery of the plaintiff below to the undivided three-fourths of the land in controversy. Those who were made parties to the *scire facias* appeared by counsel, and, in a full affidavit made by their agent, Mr. Fullerton, took defense, but, when the arbitrators awarded against them, they did not appeal and the judgment became final and conclusive. They had a right to make any defense that could or ought to have been made by the administrator in the original action. Having either neglected to do so or having failed in the attempt, it is now too late to question the

validity of the judgment on the *scire facias*, and the record thereof was properly admitted.

The regularity of the execution process is not questioned, and the sheriff's deed to the plaintiff below, having been duly acknowledged and delivered, there cannot be any valid objection to it as evidence of his title.

The fourth and fifth assignments are not sustained. Aside from the question of Mrs. Morton's competency as a witness to prove the several matters therein mentioned, we are of opinion that the testimony was irrelevant in this case. Doubtless it would have been otherwise in the original suit, or in the *scire facias*; and, in the affidavit of defense filed in the latter case, we find it alleged, *inter alia*, that the "heirs have a just and legal set-off against the said plaintiff's claim of about seven hundred and twenty dollars, with interest thereon for eight years, for rents of the aforesaid lots, commencing in September or October, A. D. 1855." That was the proper time and place to prove the agency of Weaver and the alleged receipt by him of "a large amount of rents."

We see no error in the answers of the learned judge to defendant's points, covered by the sixth, seventh and eighth assignments. There was no evidence from which the jury would have been justified in finding collusion or fraud, either in the procurement of the judgments or in the sheriff's sale, and it would have been error in the court to have submitted to them any such question. If the administrator failed to make such defense, as he should have done, in the original suit, the heirs when brought in on the *scire facias* had their day in court. It cannot be presumed that the attorney who appeared for them, and entered on the record of the *scire facias* their defense thereto, conspired with the plaintiff for the purpose of procuring a fraudulent judgment. There is no evidence of such collusion. If we were to permit judgments and other judicial proceedings to be brushed aside on naked allegations of fraud and other flimsy pretexts, titles would indeed rest upon a very insecure foundation. It is not enough to charge fraud and prove in support thereof slight circumstances of suspicion only. To be of any avail it must be clearly proved.

It follows from what has been said that there was no error in charging as complained of in the remaining assignments of error. The judgments and sheriff's sale based thereon being regular and valid, the plaintiff below was clearly entitled to recover, except as to the interest of the son who was not made a party to the *scire facias*.
Judgment affirmed.

JOHN HUMPHREY, Executor, Plaintiff Below, v. THE POOR DISTRICT OF WORTH TOWNSHIP, ADAM PISOR et al., Overseers, etc.

A., in consideration of a conveyance of a tract of land to him by B., contracted to maintain B. and give her a Christian burial after death. B. subsequently became a charge on the Poor District, and A. gave his bond to the board of overseers, conditioned for the payment of \$1,500, in annual installments of \$150, for the support of B., the board at the same time releasing A. from all liability for the support of B. *Held*, that the board had no power to release him from the obligation of his contract with B.

Held further, that the heirs of B. could not recover from the board any moneys paid them by A., and not used for the support of B.

Upon a contract merely for the support and funeral expenses of a person, the amount which shall be paid cannot lawfully be made to exceed the value of the fit support and burial of such person.

Error to the Court of Common Pleas of Butler county.

Opinion by TRUNKEY, J. Filed November 25, 1881.

In consideration of the conveyance of a tract of land by Eleanor Hines, Samuel Wimer obligated himself "for the maintenance of said Eleanor Hines her natural lifetime and give her a Christian burial." Subsequently, she became a pauper in the district of Worth and was provided for by the overseers of the poor. On April 5, 1875, Wimer gave his bond to said overseers, conditioned for the payment of \$1,500, in annual installments of \$150; and they gave him a release from all liability for the maintenance of Eleanor Hines. The overseers of the poor had a statutory right to compel Wimer to pay them the expenses of maintaining the pauper, for he owed her that debt; but they had no power to release him from the obligation of his contract. She was not a party to the release. She might have released him, but did not. Had she ceased to be a charge on the district, while living, she could have recovered from Wimer the value of her maintenance as if the release had not been given. All he owed to her was maintenance during life and burial at her death. Her heirs, or legatees, have no claim on him; there is no equity in them as respects his contract with the district. Were she living and not a pauper, she would have no right of action against the Poor District, and her executor has none. The district supported her and Wimer paid the cost.

If the pauper had property which came into the hands of the overseers, they could use it so far as necessary to reimburse their outlay in her behalf, and would be bound to pay any balance remaining to her representatives. In case a person liable for her support placed money in

the hands of the overseers for that purpose, the overplus, equitably would belong to him; there is no reason why it should be considered a part of her estate. Upon a contract merely for support and funeral expenses of a person, the total amount which shall be paid is very uncertain, but it cannot lawfully be made to exceed the value of the fit support and burial of such person. Nothing will be left out of such contract for heirs or legatees. Compromises by trustees enure to the benefit of those for whom they act; but Eleanor Hines had no part nor interest in this compromise, and the overseers did not pretend to act for her. They acted for the district in the enforcement of her contract with Wimer for her support. The executor has as little right to recover as if Wimer in the performance of that contract, had placed the money in the hands of the overseers to be used for her maintenance. We forbear expression of opinion respecting the right to the money on hand, or which remains unpaid upon Wimer's bond, as between him and the Poor District.

It is unnecessary to notice a point which, apparently, the defendant did not press in the court below, namely, that the plaintiff should have given security to indemnify the overseers before bringing suit.

The assignments of error cannot be sustained.

Judgment affirmed.

For plaintiff in error and below, *Messrs. Chas. McCandless and Lewis Z. Mitchell.*

Contra, Messrs. J. M. Thompson and G. W. Fleeger.

MARY A. LEONARD, Defendant Below, v. SIDNEY FULLER.

A bond contained a provision that the obligors would indemnify and save harmless the obligee against the payment of all moneys, costs, etc., recoverable by D. and S. "by reason of any act or thing heretofore done by the principal obligor." In a suit thereon the affidavit of claim contained a specific allegation that the obligee was compelled to pay money to the said D. and S. *Held*, that the affidavit of defense must specifically traverse and deny this allegation, and it not doing so, judgment was properly entered for want of sufficient affidavit of defense.

The general allegation that no breach of the condition of the bond occurred, and that no liability devolved upon said obligee "by reason of any act or thing done by the said principal obligor," is not sufficient.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

R. M. Leonard and Sidney Fuller were partners in the lumber business. They became indebted to John Dubois and others for lumber. Fuller filed a bill for settlement of the partnership affairs and obtained an injunction against Leonard, restraining him from interfering with

the partnership assets. Leonard disregarded the injunction and afterwards was compelled to give bond (Mary A. Leonard becoming his surety) to Fuller to indemnify him (Fuller) against the claims of Dubois *et al.*

Dubois obtained judgment, issued execution, and after levy, Fuller paid the judgment. Subsequently Fuller obtained a decree against Leonard for \$6,000, the amount which he was compelled to pay Dubois less certain credits. He then brought suit on his bond, setting forth, substantially, the foregoing facts in his affidavit of claim.

Mary A. Leonard defended against the payment of the bond, denying generally that any breach of the condition of the bond had occurred, and averring that she was informed and believed and expected to be able to prove that no liability was devolved upon said Sidney Fuller "by reason of any act or thing done by the said Robert M. Leonard as alleged in said bill."

A rule for judgment for want of a sufficient affidavit of defense was then entered, and upon argument the rule was made absolute.

For plaintiff in error, defendant below, *Messrs. George Shiras, Jr., and C. C. Dickey.*

Contra, Messrs. J. S. Ferguson and J. Charles Dicken.

Opinion by GORDON, J. Filed November 7, 1881.

The affidavit of defense in this case is wholly defective; it answers nothing which is set forth in the plaintiff's affidavit of claim, and raises no question but one which is at once determined adversely to the affiant by an inspection of that paper.

The claim sets forth the bond executed by Robert M. Leonard and the defendant to indemnify the plaintiff against the claims of John Dubois and Shaffer & Co. It further alleges that, in order to save the property of the firm of Fuller and Leonard from sale on execution, issued on a judgment recovered against said firm by Dubois, he, the plaintiff, was obliged to pay that judgment, and that a final decree was made in his favor and against Robert M. Leonard for the payment of six thousand dollars, in proceedings in equity then pending, of which the defendant had notice and in which she intervened. The affidavit of defense denies nothing of all this, but affirms that no breach of the condition of the bond appears in the plaintiff's affidavit of claim; that the decree in equity only fixed the indebtedness of Robert M. Leonard to the plaintiff but did not charge the affiant on the said bond, and finally that she believes and expects to be able to prove that no liability

devolved upon the said Fuller by reason of any act or thing done by the said Robert M. Leonard as alleged in said bill.

But as the affidavit of claim sets forth that Dubois did obtain judgment against both Fuller and Leonard, on the claim recited in the bond, which judgment Fuller was obliged to pay, certainly a breach of the bond does appear.

As to the second paragraph of the affidavit, it may be admitted that the decree only fixed the indebtedness of Robert M. Leonard to the plaintiff, and "did not charge the defendant on the bond," yet this admission comes to nothing, for the inquiry, in this case, is not as to the character of the decree but the breach of the bond, neither was it to be expected that she should be charged, on account of a breach of the bond, under a bill between the plaintiff and her brother. As to the last paragraph of her affidavit, there is but the allegation that no liability devolved upon Fuller by reason of any act or thing done by Robert M. Leonard as alleged in the bill. This is entirely too general; no particulars are given; the allegations of the bill are not set forth and denied, and it would be to no purpose if they were, for she could not, in the present case, have a retrial of what was finally settled by the decree in equity.

Judgment affirmed.

J. B. ANGIER, Trustee, Plaintiff Below, v.
LEONARD AGNEW *et al.*

A. executed a mortgage of timber land for \$5,000, which was duly recorded. A few days before the mortgage fell due, he sold the timber growing on the land to a stranger, who cut and removed it. The mortgage was subsequently sued on and the land sold at sheriff's sale for \$200. In an action of trespass on the case by the mortgagee against the purchaser of the timber, for waste.

Held, that the court below properly directed a nonsuit. *Held further*, that in the absence of allegations of fraud, evidence of the insolvency of the mortgagor at time of the timber sale was properly excluded.

Error to the Court of Common Pleas of Forest county.

Trespass on the case for waste by cutting timber trees by J. B. Angier, trustee for the creditors of the Titusville Savings Bank, against Leonard Agnew *et al.* Plea, not guilty, with leave.

On the trial, before WETMORE, P. J., the plaintiff's evidence showed the following facts: In October, 1873, the Titusville Savings Bank, a partnership association, failed. A plan was devised to get an extension of time by which each stockholder was to deposit with the plaintiff Angier, trustee for the creditors, securities as collateral to their individual liability as stock-

holders. In pursuance of this plan, Joshua Douglass, one of the stockholders, on November 29, 1873, executed to Angier, trustee, a mortgage for \$5,000, that being his proportion of the liabilities, on a tract of land in Forest county, conditioned for the payment of the debts of the bank on or before January 1, 1876. This mortgage was recorded in Forest county, May 25, 1874.

On December 29, 1875, three days before the maturity of the mortgage, Douglass, the mortgagor, sold all the timber on the mortgaged premises to one Hilands, for the defendants, for \$300. The defendants entered upon the land during 1877, and cut and carried away the greater part of the timber. This was done without the knowledge of the plaintiff.

In 1877, the plaintiff, as trustee, at the instance of the creditors, sued on the mortgage, and the land was sold at sheriff's sale for less than \$200. He then brought this suit against the defendants.

The plaintiff offered in evidence proceedings in bankruptcy of Joshua Douglass to show his insolvency in 1877, which was objected to and excluded.

At the close of the plaintiff's testimony, the court, being of opinion that the action could not be maintained, directed a nonsuit, and subsequently refused to take it off, whereupon the plaintiff took this writ, assigning for error the rejection of the above offer of testimony, and the refusal to take off the nonsuit.

For plaintiff in error, *Messrs. Neill and Heywang*.

Contra, *Messrs. C. W. Stone and E. L. Davis*.

Opinion by GORDON, J. Filed November 7, 1881.

Angier, the plaintiff, as trustee for the creditors of the Titusville Savings Bank, must stand or fall on the rights of the bank as mortgagee of Douglass, for his suit has no other foundation. Therefore, whether Douglass was solvent or insolvent at the time of the execution of the mortgage, or at the time he conveyed the timber in controversy, is of no real consequence, for the establishment of either of these conditions could neither extend nor abridge the rights of the mortgagee. Had the plaintiff proposed to prove a fraudulent combination between Douglass and the defendants to strip the land of its timber to the injury of the bank or its creditors, we would have had a question very different from the one now before us. There the insolvency of the mortgagor might have been one of the facts or circumstances which induced the fraudulent combination. But as no such proposition was made, the evidence offered was properly rejected.

We are thus left to the single inquiry, whether the mortgagor may, after the execution of the mortgage, continue, as before, to cut, dig and sell the timber upon, or the coals or other minerals in the mortgaged premises. If he may, then has the plaintiff Angier no case; for Douglass sold the timber growing upon this land to the defendants without either fraud or concealment, and if he had the right to sell they had the right to buy, take possession of, and sever the timber from the land on which it was growing. But that Douglass, as mortgagor, had such right, seems to have been very plainly ruled in the cases of *Hoskin v. Woodward*, 9 Wr., 42, and *Witmer's Appeal*, Id., 455. In the first of these two cases the question was, whether the mortgagee could follow with his execution issued upon a judgment obtained on the bond secured by the mortgage, a lathe, one of the fixtures of a machine shop, which had been severed by the mortgagor and sold to a third party, and it was held that he could, inasmuch as such severance and sale were a fraud upon the rights of the mortgagee. But from this ruling the sale of lumber, fire-wood, coal, ore, fruit or grain found in or growing on the land, was expressly excepted, and it was said that these may be sold without violating the rights of the mortgagee, and for the reason that products of this kind are usually intended for consumption and sale.

We may also add that the use of these things in the way thus spoken of cannot be a fraud *per se* on the mortgagee, for he must know when he takes his security that such articles will continue to be subject to their ordinary use; indeed, as was said in the case cited, they may offer the only means which the debtor possesses with which to pay the mortgage.

The second case above referred to was that of a bill in equity by judgment creditors to restrain the removal and sale of a steam engine, part of the premises bound. Here again, whilst it was admitted that such a bill could be sustained for the purpose indicated, yet citing *Hoskins v. Woodward*, it was held that the fraudulent character of the severance must be determined by the character and circumstances of each case. Whilst the dismantling of mills, factories and other permanent structures on the eve of bankruptcy must be regarded as a fraud on the rights of the mortgagee, yet this rule did not apply to the use and sale of timber, coal and other material products.

It will be observed in this case that no distinction is made between the rights of the mortgagee and judgment creditor; indeed, both are said to stand on the same footing and to be supported by the same principles. Mortgages and

judgments are alike liens and nothing more, and they differ only in the methods prescribed for their collection; beyond this the rights which belong to their owners are the same. What, then, must be the effect of the doctrine contended for by the plaintiff? Just this: that the purchaser who buys ore, coal or timber from the owner of land covered by a lien of any kind is guilty of constructive fraud against the lien creditor, and may at any time within six years from his purchase be subject to an action on the case. But a doctrine such as this would operate so disastrously upon the debtor and the business of the country that, were we to adopt it, it would soon be found to be a burden too intolerable to be borne. The very means necessary for the payment of these liens would be taken from the debtor, whilst no prudent person could risk the purchase of so much as a timber tree or a ton of coal from such debtor without having first obtained the consent of all his lien creditors. As we cannot agree to be instrumental in the introduction of a condition of affairs such as this, opposed alike to our own authorities, and the common understanding of the people, we must adopt and affirm the ruling of the court below.

Judgment affirmed.

WILLIAM WARD, Defendant Below, v. R. H. FIFE, Sheriff, etc.

Notice was given at a sheriff's sale of certain terms, upon the noncompliance with which, by the purchaser, the property would be resold at a subsequent day, and the purchaser at the first sale be held liable for any deficiency between the price bidden by him and that which the property might bring at the second sale. In an action brought to recover the price bidden at the first sale, *held*, that the sheriff could recover, though the property was not again sold at the time specified in the notice given, and though the purchaser failed to comply with the terms of sale, if the purchaser by his conduct waived and rendered unnecessary the putting up of the property a second time.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Christopher Irwin, for use of P. B. Reilly, obtained a judgment against John Spear *et al.* on a mortgage upon certain property in the plan of Lawrenceville in the city of Pittsburgh.

The judgment was prosecuted to execution and the property advertised for sale. The terms of sale, read by the sheriff to the bidders previous to the sale, were, "Five hundred dollars of the bid down, and if the balance of the purchase money was not paid by 2 o'clock on Saturday, the next day, that the property would then be sold again at the risk of the purchaser."

The property was knocked down to William Ward for the sum of seven hundred dollars.

Ward did not comply with the terms of sale, a question having arisen between himself and the officers of the Central Building and Loan Association, as to the amount due upon a mortgage held by the association upon the same property, which was not divested by the sale.

The property was not offered for sale on Saturday, but subsequently the building and loan association obtained judgment upon their mortgage, and upon that judgment the property was again sold.

The sheriff then brought the present action against William Ward to recover the amount of his bid with interest. Upon the trial the defendant below contended that the sheriff, having failed to resell the property on Saturday, in accordance with the terms announced at the sale, he was thereby relieved. The plaintiff below alleged that Ward was told that if he was mistaken as to the amount of the prior incumbrance, he need not take the property, but that Ward refused to permit the property to be put up and sold again and thereby rendered a resale unnecessary.

The defendant below requested the court to charge the jury, "that if they believe that the sheriff gave notice on the day the defendant bought the property, on Friday, June 9, 1876, that the terms of sale were, 'that in case the money bid was not paid before 2 o'clock next day (Saturday), that the property would be put up again for sale on that day,' and the said property not having been put up again for sale on Saturday, although no money had been paid by the defendant, that then the defendant was released and plaintiff cannot recover." The court replied, "affirmed, unless you believe that the defendant by his conduct waived and rendered unnecessary the putting up of the property on Saturday."

To this answer plaintiff and defendant accepted and a bill was sealed for both. The jury found for the plaintiff below, whereupon the defendant took this writ, assigning as error the answer of the court to the above point, it being the only error assigned.

The plaintiff in error maintained that a sheriff's sale is a judicial sale and not within the Statute of Frauds, but it was the sheriff's duty to sell for cash, and the imposition of any terms, such as those proven, were unofficial, and, if unofficial, anything that was said or done between the sheriff and Ward, being in parol, would come within the Statute of Frauds, therefore, as they related to the sale of real estate, Ward could not, under the circumstances, be held to comply.

The defendant in error assumed the position

that the sheriff was not bound in any event to put the property up for sale again. The conditions not being for the benefit of the purchaser, the sheriff may resell if he sees fit, but the purchaser becomes bound absolutely as soon as the property is knocked down to him. The time of sale providing for a cash payment and resale upon failure to comply, do not preclude the enforcement of any other penalty upon such failure, the condition being intended as a security that the purchaser will fulfill his contract to purchase, and is not a penalty for a failure, but a pledge to prevent it.

For plaintiff in error, defendant below, *Messrs. Bruce & Negley*.

Contra, *Messrs. D. T. Watson, T. D. Chantler and S. W. Cunningham*.

PER CURIAM. Filed October 24, 1881.

There was evidence to submit to the jury that the plaintiff in error had waived his right under the conditions of sale to have the property put up and resold on the following day, and the jury below found against him. We think that the qualification by the judge below to his affirmation of the third point was entirely correct.

Judgment affirmed.

Estate of Dr. ADDISON ARTHURS, Deceased.

Appeal of WILLA ARTHURS, Widow, et al.

Marriage and birth of a child do not work an absolute revocation of a will made before the marriage. The appointment of executors by such will is not affected by subsequent marriage and birth of a child.

Appeal from the decree of the Orphans' Court of Allegheny county.

Dr. Addison Arthurs died September 28, 1880. After his death a will was found among his papers, bearing date April 4, 1873, by which he devised his estate to his brothers and sisters. He was married March 25, 1878, to Willa Arthurs, one of the appellants, by whom, on the 6th day of August, 1880, he had one child, Addison E. Arthurs, whose guardian is the other appellant.

A caveat was filed by the widow and guardian of the minor child against admitting the will to probate. After hearing testimony, the register being satisfied as to the due execution of the will, admitted it to probate. From this action of the register the widow and guardian appealed to the Orphans' Court, where, after argument, HAWKINS, P. J., dismissed the appeal, filing an opinion (reported in 28 PITTSBURGH LEGAL JOURNAL, 248). From this decree the widow and guardian appealed.

For appellants, *Messrs. Barton & Son*.

Contra, *George Shiras, Jr., Esq.*

PER CURIAM. Filed October 24, 1881.

The marriage and birth of the child after the date of the will did not work an absolute revocation of the will. The words of the statute are that the revocation shall only be "so far as shall regard the widow or child." Accordingly it has been expressly held that it does not affect the appointment of executors: *Coates v. Hughes*, 3 Binn., 495. It is clear then that we must affirm the decree below, but modify it, as we have a right to do, so that the decree shall not extend further than the appointment of executors.

Decree affirmed and modified so as to declare that the probate of the will shall not preclude the widow and child from setting up at any future time the invalidity of all other parts of the will except the appointment of executors, and that the costs be paid from the estate of the testator.

T. H. BAIRD PATTERSON, Defendant Below,
v. WESLEY WILSON, Trustee.

In an action against an indorser by the holder of a note intended to be an ordinary negotiable note when made by the parties, but sealed inadvertently, the plaintiff can recover.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

T. H. Baird Patterson, Wesley Wilson and Richard Long, among others, were members of a limited partnership which was dissolved by agreement of all its members in January, 1878. Among the stipulations contained in the agreement, providing for the winding up of the affairs of the company, was one in which Long and Patterson agreed to execute and deliver to Wilson a promissory note. The note was to be drawn by Long and indorsed by Patterson, and was so drawn and indorsed, but contained a seal opposite the name of the maker, Richard Long. At maturity the note was protested for non-payment, and this action was brought, the declaration containing the ordinary count in actions by an indorsee against an indorser. Upon the trial it was contended by the plaintiff that he did not know or observe that there was any seal attached to the name of the maker, while the defendant claimed that the plaintiff not only knew that the seal was upon the note, but also that he dictated the manner in which the note should be drawn, and insisted that it should be sealed.

The Court (EWING, P. J.), charged the jury as follows, viz:

"Now, if this note was made under seal and taken by Wilson inadvertently, without knowledge that it was so, supposing that he had an ordinary negotiable promissory note, according

to the agreement, we think he can recover, and your verdict should be for the plaintiff. If, however, he took it, knowing what it was, and especially, if he dictated how the note should be drawn—if this is what he demanded and the others saw fit to give—that is all he has, and he must stand on the note as he took it." The jury found for the plaintiff, and a writ of error was taken; that portion of the charge quoted above, embraced in the first sentence, being the subject of the seventh assignment of error.

For plaintiff in error, defendant below, *J. S. Ferguson, Esq.*

Contra, Messrs. Hampton & Dalzell.

PER CURIAM. Filed November 14, 1881.

The whole merits of the case are summed up briefly by the learned judge in that portion of his charge complained of in the seventh assignment. "If this note was made under seal and taken by Wilson inadvertently, without knowledge that it was so, supposing that he had an ordinary negotiable note, we think he can recover, and your verdict should be for the plaintiff." There was ample evidence to show that the agreement and understanding of the defendant was that he was to be responsible on his indorsement, and we find no error in the rulings of the learned judge. *Judgment affirmed.*

Orphans' Court.

In Re Estate of ROBERT CAMPBELL, Dec'd.

- (1.) C. and R. were in partnership, their assets consisting of moveable and real estate. C. died and at the time of his death the debts of the firm were greater than the value of the moveable property. The real estate was valued at \$40,000. R. bought the interest of the deceased partner from his administratrix under order of Orphans' Court, for \$10,000. *Held*, that as between the widow and child of the deceased partner, this fund must be treated as real estate.
- (2.) In the settlement of partnership affairs by surviving partner, the ordinary rule with reference to order of appropriation, (1) moveable property and (2) real estate, applies.

Opinion by HAWKINS, P. J. Filed April 5, 1882.

The general order of appropriation of property to payment of debts by process of law, is (1) the personal estate and (2) the real estate of the debtor. The reason of this rule is to be found in the difference in the nature of these classes. The one being moveable, is liable to be lost or stolen, is easily transferred in title and from hand to hand, and is destructible; while the other is unmoveable, is indestructible and the transfer of title to it is clogged by technical rules. The one enters easily into commerce and finds ready sale; and the other does not.

While for certain purposes the assets of partnerships, including land, are treated as being personal estate, so far as the land is concerned it is a mere fiction. The actual nature of the two classes continues the same. They have the same incidents and the same reasons exist for the order of appropriation in other cases: *Foster's Appeal*, 74 Pa. St., 391.

If this rule then be applied to the facts of the present case, the fund for distribution must be treated as real estate. The debts of the firm were more than sufficient to exhaust the moveable property, and such property must be presumed to have been first appropriated to the payment of those debts. This taken in connection with the facts that the amount paid the administratrix was less than one-half of the value of the real estate of the firm, leaves no room for doubt of the character of this fund.

For Mrs. Campbell, *W. B. Negley, Esq.*

NEW BOOKS.

THE PHILADELPHIA REPORTS, containing decisions published in *The Legal Intelligencer* during 1877 and 1878. Compiled by HENRY C. BROWN. Vol. XII. Philadelphia: J. M. POWER WALLACE, 132 South Sixth Street. 1882.

This volume contains one hundred and seventy-two pages of Orphans' Court cases, three hundred and twenty-seven pages of Court of Common Pleas cases, eighteen pages of Court of Oyer and Terminer cases and seventy-one pages of cases in the Court of Quarter Sessions of Philadelphia county. There are a great many valuable cases reported in this volume which is fully up to its predecessors in the series in every respect.

THE PRACTICE IN THE COURTS OF PENNSYLVANIA under the Act of 10th April, 1848, § 9, usually termed the Sheriff's Interpleader Act. By DAVID H. BOWEN, of the Philadelphia Bar. Philadelphia: REES WELSH & Co. 1882.

This treatise of forty-two pages gives the text to the Sheriff's Interpleader Act and the decisions as to the necessary steps to be taken to make claim of title as to the form of the interpleader, the trial, writ of error, execution, etc. All the forms necessary are also given and much other valuable information. It is a cheap and convenient compendium of the practice and decisions.

THE ETHICS OF COMPENSATION FOR PROFESSIONAL SERVICES. An Address before the Albany Law School and an Answer to Hostile Critiques. By EDWIN COUNTRYMAN. Albany: W. C. LITTLE & Co., Law Book Publishers. 1882.

This little book is a reply by ex-Judge Countryman to criticisms by the *Albany Law Journal*, on one of his lectures before the Albany Law School, in which he advocated the propriety of agreements by attorneys to work for contingent fees.

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PITTSBURGH, PA., APRIL 26, 1882.

Supreme Court, Penn'a.

THOMAS FAWCETT, in Trust for Himself and
Others, Plaintiffs Below, v. C. AULTMAN et al.

AULTMAN et al.'s APPEAL.

HOPKINS' APPEAL.

FAWCETT'S APPEAL.

The contract obligations imposed upon the stockholders of a corporation, organized and doing business in another State, by the constitution and laws of that State, may be enforced by the courts of this State against such of the stockholders as reside within the State. In subscribing originally to stock, or taking it by assignment, they assume all the obligations imposed upon them by the constitution and statutes, and the contract can be enforced in any State in which they are amenable to the process of the courts.

The plaintiff below, a stockholder in an utterly insolvent Ohio corporation, became the holder of all the indebtedness against it and filed a bill in equity to compel contribution by the other stockholders to pay the debts. He obtained a decree *pro confesso* against the corporation and several of the defendants. The other defendants were within the jurisdiction of the court. *Held*, that the case was cognizable in a court of equity.

Bank of Virginia v. Adams, 1 Parsons' Eq., 534, distinguished.

The plaintiff's bill, when filed, claimed as a creditor. By the advice of the court below the plaintiff amended and claimed as a trustee for himself and other stockholders, who had paid more than their share of the debts of the corporation and asked contribution. *Held*, that the amendment was not necessary, but was not error.

Where there is a legal plaintiff, either at law or in equity, it is not essential that his *cestui que trust*, if he is a trustee, should be named in an action or proceeding against third parties to enforce his rights as trustee.

The directors of the corporation asked and accepted an extension by the creditors of it. *Held*, that the liability of the stockholders was not discharged thereby.

Patterson v. Wyoming Co., 4 Wright, 122, explained.

A stockholder in a corporation, whether original or holding by transfer, cannot rid himself of his responsibility to creditors after the corporation has become insolvent.

Per SHARPSWOOD, C. J.: We might hold it as the law of Pennsylvania that a stockholder, holding by transfer from a subscriber, may relieve himself from liability for unpaid installments to the corporation by a transfer duly entered on the books and accepted by the corporation, but not an original subscriber.

Where stock is transferred to a man as collateral, and

stands in his name, he incurs liability as a stock holder, just as if he was the actual beneficial owner.

National Bank v. Case, 9 Otto, 628, approved and followed.

The Constitution of the State of Ohio provides that the stockholders in corporations shall be liable for the debts "over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock." A statute passed in obedience to the requirements of the constitution contained the words *stock subscribed* instead of *owned*. *Held*, that the statute must be construed in conformity with the constitution, and a stockholder who was awarded a stock dividend (which he refused to surrender to another party who claimed it), was liable, as other stockholders.

A trustee who purchases at his own sale cannot reap the profits of the transaction as against his *cestui que trust*, no matter how fair and honest the transaction may be, and notwithstanding the *cestui que trust* refused to join in the purchase.

Ashhurst's Appeal, 10 P. F. Smith, 290, distinguished: *Webb v. Dietrich*, 7 W. & S., 401; *Chronister v. Buskey, Id.*, 152; *Chorpenning's Appeal*, 8 Casey, 315; *Parshall's Appeal*, 15 P. F. Smith, 224, and *Gibson v. Winslow*, 10 Wright, 330, approved and followed.

Appeal from the decree of the Court of Common Pleas, No. 2, of Allegheny county.

Prior to 1866 E. Ball had a large establishment in Canton, Ohio, for the manufacture of agricultural implements and machinery, and for many years had been doing an extensive business. November 10, 1866, a company was incorporated under the laws of Ohio as E. Ball & Co., for the purpose of purchasing and continuing the business. E. Ball was a large stockholder, but most of the stockholders resided in Pittsburgh and owned nearly all the stock. The capital was \$500,000; 5,000 shares of \$100 each. The complainant, Thos. Fawcett, was treasurer of the corporation from the beginning to the end, and had his office in Pittsburgh, where the meetings of the stockholders and board of directors were held.

Down to September 24, 1868, only \$311,000 of the capital stock had been subscribed. On the 19th of October of that year a stock dividend was declared of 33 per cent., and the remainder of the stock sold between that date and September 17, 1869.

In July, 1870, the company was embarrassed, and resolved to issue bonds to the amount of \$200,000, to pay debts, expecting the bonds to be taken by the stockholders, but the project failed. Two months later, September 17, 1870, the balance sheet showed assets, in book accounts and bills receivable, to the amount of \$1,196,510.78; and debts to the amount of \$930,204.48. From that date the liabilities were not increased, but gradually diminished. The company was greatly embarrassed. A mortgage had been given to Thomas Fawcett on a portion of the

real estate of the corporation, to secure him as an indorser on the company's paper. On the 10th November, 1870, at a stockholders' meeting, another mortgage to Thomas Fawcett, Lewis Peterson and Alexander Chambers, was authorized, covering all the real estate, fixtures and machinery of the corporation, to secure them as indorsers; and also, it was ordered that all the available assets of the company be put under their control for the same purpose. An extension was asked for from the creditors, and obtained, on the basis of paying one-third January 1, 1872; one-third September 1, 1872; and one-third March 1, 1873. At that time nineteen-twentieths of the liabilities were in Pittsburgh, and Thomas Fawcett was indorser for over \$700,000.

August 28, 1871, at a stockholders' meeting, a power of attorney was authorized and given by the board of directors to Fawcett, Peterson and Chambers, to sell any and all the real or personal estate, to pay the debts of the company. No other meetings of the stockholders or board of directors was had until January 22, 1874.

In January, 1872, Fawcett, having had to lift a large amount of paper on which he was indorser, proceeded on his mortgage, and the real estate, fixtures and machinery at Canton were sold at sheriff's sale for \$85,000, and purchased by R. C. Loomis, R. Miller, Jr., and P. H. Miller. The purchase money was paid by notes of the corporation which Fawcett had lifted as indorser, loaned to them for the purpose, and received back by him from the sheriff on the sale. Loomis and the two Millers purchased as trustees for Fawcett and others, who either had paid or expected to be compelled to pay all the debts.

Collections were being made on the notes and book accounts, and applied in payment of the debts. In February, 1874, an understanding had been reached with the creditors by Fawcett and other stockholders, who were trying to pay off the debts, to liquidate and pay off the same at 75 per cent. of the amount.

March 31, 1874, after notice to all stockholders, the book accounts and notes, by virtue of the power of attorney above stated, were put up and sold at public auction, in Pittsburgh. They were sold in large lots, each lot embracing all in a certain section of the United States, composed of one or more States. The total sales amounted to \$43,688.58. This sale exhausted all the assets of the corporation. After using in payment all proceeds of sales, and exhausting all assets of the corporation, there remained of the liabilities unpaid, \$427,272.56, which the creditors had agreed to settle at 75 cents on the dollar.

All the stockholders had been called upon to

pay their *pro rata* to the liquidation of these liabilities. The defendants in the amended bill refused to do anything.

April 22, 1874, a written agreement was entered into by the stockholders willing to contribute, forming a syndicate, providing money to pay off these debts and have them assigned to Breed and Frew, as trustees, for the purpose of proceeding against the delinquent stockholders for contribution.

December 24, 1874, all debts having been thus settled and assigned to Breed and Frew, they, for the nominal consideration of one dollar, assigned them to Thomas Fawcett, who, on the 15th of March, 1875, filed his bill in this case.

By the Constitution and Statutes of Ohio, stockholders, in addition to their stock, are personally liable to the amount of their stock, for the payment of the debts of the corporation.

The bill was filed in the name of Thos. Fawcett as plaintiff, and all the other stockholders of E. Ball & Co. were made defendants.

The bill set forth the amount of the indebtedness of the company, after exhausting all its assets; that he, the plaintiff, was accommodation indorser on the same; and that, "with the assistance of others, did purchase and have assigned to himself, all the outstanding indebtedness, amounting to the sum of \$427,272.56, which, with the interest thereon, remains due and owing to your orator." It then sets forth the liability of the stockholders under the Constitution and laws of Ohio, and their duty to contribute, and prayed that "an account may be taken between your orator and the respondents, to ascertain what amount each respondent should pay and contribute to your orator on account of said indebtedness;" and for such other and further relief as might be equitable and just.

The cause was referred to John W. Wiley, Esq., master, who reported that the plaintiff was entitled to the relief prayed for in his bill, and presented a decree fixing the amount each of the defendants should contribute. On exceptions filed, the Court, WHITE, J., delivering the opinion, held that the court had jurisdiction of the bill; that each stockholder was individually liable for the debts of the corporation to the amount of his stock, but that the bill could not be maintained by Fawcett *as a creditor*. The court suggested and allowed an amendment of the bill so as to stand in the name of Fawcett as trustee for those stockholders who composed the syndicate against the other stockholders for contribution. To the amendment exceptions were filed, which were dismissed by the Court, WHITE, J., filing another opinion and the cause

sent back to Mr. Wylie, who made a second report, recommending that the bill be dismissed as to all the defendants, except S. McKee and Stewart McKee, for the reason that they had all made *bona fide* transfers of their stock and were not liable as contributors under the amended bill. The transfers by the McKees he found were not made *bona fide*, and that they were liable to the plaintiff. At the request of counsel the master presented a schedule for contribution in case his views should not be sustained by the court.

Exceptions were filed on behalf of Fawcett and some of the defendants to this report, and after argument the court overruled the master in so far as he reported in favor of the respondents, and entered a final decree that they all should contribute, in proportion to their stock, substantially as found by the master to the plaintiff, Fawcett, as trustee of the syndicate.

Fawcett took this appeal, assigning that the court below erred in holding that the stockholders who refused to contribute to the syndicate could claim a share of the profits made by the syndicate out of the purchase of the personal property of E. Ball & Co.

Aultman with others assigned for error, that having transferred their stock prior to the insolvency of the corporation, they were not liable, and Aultman further claimed, that having held the stock as collateral security for the payment of a debt, he was not liable.

All the other defendants who appealed assigned for error:

1. That the courts of Pennsylvania had not jurisdiction of the cause of action.

2. That they were liable only as guarantors, and Fawcett, having without their consent, agreed with the creditors of E. Ball & Co. and procured an extension of two years for the payment of the debts of the firm, they were released.

3. That the court below erred in allowing the amendment and in not dismissing the bill.

Most of the appellants assigned special reasons for their release by reason of the assignment of their stock prior to the insolvency of the corporation.

James H. Hopkins claimed that as the stock held by him was a dividend received from the corporation, it was not stock subscribed for as required by the statute.

For Fawcett, *D. T. Watson, Esq.*, and *Messrs. Knox & Reed*.

For Aultman and others, *Messrs. H. & G. C. Burgwin, Bruce & Negley, John M. Kennedy, Esq.*, and *A. H. Miller, Esq.*

For James H. Hopkins, *T. C. Lazear, Esq.*

Opinion by SHARSWOOD, C. J. Filed January 2, 1882.

These are appeals from the same decree and may be considered and disposed of together, as the principal questions raised are the same in all. The facts which are not in dispute are very succinctly and clearly stated in the opinion of the learned court and need not be repeated here. We have had the advantage of very able and elaborate arguments by the counsel, both in the printed paper-book and orally at the bar.

The first question is as to the jurisdiction of a court of this State to enforce the obligation imposed upon the defendants as stockholders of the corporation of E. Ball & Co. by the Constitution and laws of the State of Ohio. The Constitution, Article XIII, Sec. 3, provides "Dues from corporations shall be secured by such individual liability of the stockholders and by other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock." And the statute under which the corporation of E. Ball & Co. was organized provides in conformity to the constitution, "that all stockholders of any * * * joint-stock company, organized under the provisions of this act, shall be deemed and held to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of said company." It has been earnestly contended that the individual liability thus imposed on the stockholders is a penalty, and that the courts of one State will not enforce the penal laws of another. This is undoubtedly so, but was this liability thus provided for in any sense a penalty? The defendants became owners of their stock, either by original subscription or by assignment from subscribers, and assumed voluntarily all the obligations imposed upon them as owners. It was a contract, express or implied, to pay not only for the stock owned or subscribed, but so much in addition as would be necessary for the purpose of securing the creditors of the company. This contract could be enforced in any State in which the defendants were amenable to the process of the courts. Upon the construction of this statute we are bound to respect, if not to follow implicitly, the decisions of the courts of Ohio. It has been held expressly by this court, in *Merrimac Mining Co. v. Levy*, 4 P. F. Smith, 227, that in a suit arising under a charter of another State, the decisions in that State are the best evidence of the rights and duties of the stockholders under it. In what

appears to be the last decision of the Supreme Court of Ohio (*Brown v. Hitchcock*, 1 *Ohio Law Journal*, 307), throughout the opinion delivered by WHITE, J., the obligation in question under this same statute is treated as a part of the contract of the owner or subscriber to the stock, and the opinion is sustained by *Hawthorne v. Calef*, 2 Wall. S. C., 10, in which it was held by the Supreme Court of the United States that a State statute, repealing a former statute, which made the stock of stockholders in a chartered company liable for the corporation debts, is, as respects creditors existing at the time of the repeal, a law impairing the obligation of contracts, and therefore void. We have no difficulty then in holding that the courts of this State have jurisdiction to enforce this contract.

Assuming this there can be no doubt that the case presented on the bill below was proper for the cognizance of a court of equity. It is not like the case of *Bank of Virginia v. Adams*, 1 Parson's Eq., 534, the correctness of the ruling in which it is not necessary to discuss. It was there held that a court of equity can exercise no jurisdiction to compel the stockholders of a foreign corporation residing here to pay the stock subscribed to such company on the application of a creditor. That was a bill by the Bank of Virginia, a creditor of the Rappahannock Mining Company, on behalf of itself and such other creditors as should come in and contribute to the expense of the suit against thirty-four stockholders. It was not alleged that the Rappahannock Mining Company was insolvent, nor was it made a party. The prerequisite of such a proceeding was the repeal or neglect of the corporation to enforce the subscription. "If stockholders in one State," says Judge KING, "could be so proceeded against, so might they be in every State of the Union of whose jurisprudence English equity formed a part. Such proceedings might even be simultaneous and certainly could not fail to present strange conflicts of decision." The record before us presents an entirely different case. The plaintiff is alleged to be the holder of all the indebtedness of the corporation of E. Ball & Co.; that corporation is a party and the bill has been taken against it *pro confesso*; it is utterly insolvent, and all its assets, real and personal, are exhausted, and the defendants are all the stockholders, they reside within the jurisdiction, were served with process, some appearing and taking defense, and the bill taken *pro confesso* against such as did not plead, answer or demur under a rule upon them for that purpose which was duly served. It is evident that the court had full grasp of the whole case. They could

make no decree which they were not fully competent to enforce. They were not required to settle up the business of a foreign insolvent corporation. It was all settled up—the creditors paid as far as its assets would go by the sale of all its real and personal property. We are not called upon to say how it would be, if the case were not so. The reasons against a court of equity, assuming jurisdiction over the affairs of a foreign corporation, are certainly very cogent, and will have to be maturely considered if such question should hereafter arise. We do not now say that the court ought not in the exercise of sound discretion to decline to interpose at the suit of some of the creditors against some stockholders of such a corporation.

The next question is as to the amendment of the bill allowed or rather advised by the court and made by the plaintiff. It is most strenuously contended that it was an entire change of the cause of action, and therefore ought not to have been allowed. We are of a different opinion. There was no change in the cause of action, though the ground upon which the plaintiff's equity was rested was formally changed. The original bill was by him claiming as a creditor. By the amended bill he claimed as a stockholder, having paid more than his share of the debts and seeking contribution from the other stockholders. In either case the decree would have been the same. As a creditor, as is now conceded, he could not have recovered more than he had actually paid. A surety or accommodation indorser, which the plaintiff originally was, who compromises with the creditor, cannot recover of his principal more than he is actually out of pocket. It appeared by the bill, as originally filed, that the plaintiff, with the assistance of others, did purchase and have assigned to him all the outstanding indebtedness of the corporation. The allegation, however, of any trust in the plaintiff was wholly unnecessary. Where there is a legal plaintiff, either at law or in equity, it is not essential that his *cestuis que trust*, if he is a trustee, should be named in the action or proceeding. They are in no sense parties, except to enforce against them a liability for costs. If the plaintiff recovers the court cannot settle the equities between him and his *cestuis que trustent*. That must be the subject of another proceeding between him and them. The order directing the use plaintiffs to be placed on the record was unnecessary. But it did the defendants no harm. Indeed it gave them an additional security as it disclosed the names of parties liable for the costs if the plaintiff's bill was dismissed or the costs were finally for any reason imposed upon him. The defend-

ants might perhaps have required it to be done, but they certainly have no ground to complain of it.

It has also been urged that the obligation of the stockholders under the statute was collateral only—not a primary but secondary liability—in short, that they were guarantors or sureties, and therefore the extension granted by the creditors to the company released them. It is not necessary to enquire into the circumstances under which these extensions were granted. Such a liability under a similar statute is said, indeed, in *Patterson v. Wyoming Co.*, 4 Wright, 122, to be "analogous to a case of guarantee." That is, as there explained by Mr. Justice LOWRIE, "to be enforced if the regular process in the principal contract proves fruitless or if the corporation becomes insolvent." But the analogy can be pushed no further. *Nullo similes quatuor pedibus currit.* The directors are the representatives of the stockholders in all their dealings with creditors. When they asked and accepted an extension it was an act binding on the stockholders. It was their assent. Beside, which, when the extension expired, the debt being unpaid, was revived and was then as a debt newly contracted as far as the then existing stockholders were concerned, and for which their liability under the statute then accrued. The ground upon which the surety is discharged by time given by the creditor on a binding contract, without his assent, is that he is thereby deprived of his right to pay the debt and bring suit immediately against his principal. It is evident that such a remedy would have been entirely impracticable in a case like the present.

We come now to consider the cases of those of the appellants, who claim that an exception should be made in their favor, for the reason that they had assigned their stock to others before these proceedings were commenced. We might hold it as the law of Pennsylvania that a stockholder, holding by transfer from a subscriber, may relieve himself from liability for unpaid installments to the corporation by a transfer duly entered on the books and accepted by the corporation, but not an original subscriber. His obligation is *debitum in presenti, solvendum in futuro*: *West Philadelphia Canal Co., v. Innes*, 3 Whart., 198; *Pittsburgh and Connellsville Railroad Co. v. Clarke*, 5 Casey, 146. But, however, this may be, we think it very clear that a stockholder, whether original or holding by transfer, cannot rid himself of his responsibility to creditors after the corporation has become insolvent. We think that Mr. Thompson in his treatise on the Liability of Stockholders has correctly summed up the doc-

trine of the American cases: "A transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect of such liability, is void, as to creditors of the company and as to other shareholders, although as between the transferor and the transferee the transfer may be out and out." Section 215. See the cases cited by him, to which may be added our own case of *Egbert v. The West Chester and Philadelphia Railroad Company*, 4 Casey, 339. The case before referred to in the Supreme Court of Ohio, *Brown v. Hitchcock*, *supra*, goes much further, holding that the liability of the stockholders under the statute attaches at the time the debt is contracted or the liability incurred by the corporation, and that after such liability attaches to a stockholder it is not discharged by the subsequent assignment or transfer of his stock. It is upon the faith of the existing liability of the stockholders that the creditors must be presumed to trust the corporation and to allow them to get rid of their liability by a transfer of the stock would be to render the remedy of the creditor illusory. In the event of the corporation getting into financial difficulty, threatening insolvency, all the stockholders would hasten to transfer their stock to irresponsible parties and the creditors would be practically set at bay. We think, then, as to Bidwell, Stewart McKee and McKee's executors, the decree was right.

In reference to *Aultman's Appeal* it is now too well settled to be any longer a question, that when stock is transferred to a man as collateral and stands in his name, he incurs liability as a stockholder, just as if he was the actual beneficial owner: *National Bank v. Case*, 9 Otto, 628. Most especially is this just and right as to creditors who trust to his name and have no notice of the secret trust upon which the stock is held.

The special exception of James H. Hopkins rests on a verbal criticism which cannot avail him. He was awarded a stock dividend which he knew in December, 1868. He refused to surrender it to another party who claimed it and he still holds it. He contends that the liability under the Ohio statute is confined to stock *subscribed*, and as his stock was not subscribed, he is not responsible. The language of the Constitution of Ohio, as we have seen, is "stock owned," and it is plain that the statute is subordinate to the constitution and must be construed in conformity with it.

It remains to consider *Fawcett's Appeal*. He urges that the court below was in error in hold-

ing that as representing the Pittsburgh Syndicate he was bound to account for the profits of the purchase of the personalty made in the names of Breed and Frew at the sale of the assets of E. Ball & Co. It is not a matter in dispute that the sale of these assets by the authority of the directors was proper and even necessary; that the nature of the assets being principally small debts, scattered over all the States of the Union, was such that they could not practically have been realized in any other way; that the sale was fair and open, that it was largely advertised; special notice sent to every stockholder, and full opportunity given to every one to bid. If there is any case in which such a sale can be upheld as against *cestuis que trustent*, it would seem to be this case: *Ashhurst's Appeal*, 10 P. F. Smith, 290, is strongly relied on by the counsel for the appellant. That case, however, was decided on its peculiar circumstances, principally the laches and long continued acquiescence of the *cestuis que trustent*. There the sale was in 1857 and the bill to impeach it not filed until 1865. It was held that if a trustee to sell becomes the purchaser, the purchase is generally voidable, but the *cestuis que trust* must move in a reasonable time. Here the sale was March 31, 1874, and this bill filed March 15, 1875. *Non constat* that the appellants knew before that the purchase by Breed and Frew was for the Pittsburgh Syndicate. But the principle that a purchase by a trustee at his own sale, may at the election of the *cestuis que trust*, be treated as made for his benefit, is too important to be frittered away by new distinctions. It is not in dispute that this purchase was made by the Pittsburgh Syndicate. It was composed of a number of the stockholders who had associated and advanced money to settle the debts of E. Ball & Co., looking to the liability of all the stockholders for their reimbursement. The other stockholders may not have had the ability to contribute their proportion to make up the large sum of money necessary for this purpose. It ought not, therefore, to prejudice them that they had been repeatedly asked, and even before the master, to join this syndicate and had declined. All the authorities show that it is not a question of the honesty and fairness of the transaction, but it is put solely on the ground of policy: *Webb v. Dietrich*, 7 W. & S., 401; *Chronister v. Buskey*, *Ibid.*, 152; *Chorpenning's Appeal*, 8 Casey, 315. Even in the case of a purchase at a public judicial sale, the same principle applies where the trustee has had any hand in bringing about the sale: *Parshall's Appeal*, 15 P. F. Smith, 224. The members of the Pittsburgh Syndicate were joint

owners with the other stockholders of the property of E. Ball & Co. They stood in such a relation to them as to forbid their taking any advantage of their position and ability to purchase: *Gibson v. Winslow*, 10 Wright, 380. It is strongly urged on behalf of the appellant that if it had turned out that the sale was for more than could be realized from the assets, that the purchase eventuated in a loss instead of a profit to the buyers, they could have had no claim to call upon the stockholders to make it good. It is undoubtedly so but this is the case in all such transactions. The trustee must bear the loss, if any, though the *cestuis que trust* is entitled to the profit.

It is believed that we have thus considered and disposed of all the points of any importance in these appeals.

Decree affirmed and appeal dismissed at the costs of the appellants.

S. W. MCGINNESS, Plaintiff in Error, Defendant
Below, v. R. S. THOMPSON & CO.

An article of agreement for the sale of a leasehold, provided that the vendee would pay certain notes given by him for the purchase money, pay all ground-rent and taxes, keep in force a fire insurance risk, and "that in case any of the foregoing obligations" remained "unpaid for a period longer than thirty days after maturity," the amounts paid should be forfeited and the vendor might re-enter. *Held*, that the word "obligation" in the agreement was properly limited by the court below to the notes given for the purchase money, and that to justify an entry the breach of the condition should not be at all doubtful.

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This was an action of trespass by R. S. Thompson & Co. against S. W. McGinness. By agreement in writing, dated April 20, 1875, McGinness agreed to sell to R. S. Thompson a certain leasehold in Allegheny City, Pa. The agreement also provided for the payment by Thompson of certain notes given by him for the purchase money and falling due in six, twelve and eighteen months from the date of said agreement.

"Further, the said R. S. Thompson agrees to pay all ground-rent and taxes that may be assessed against said leasehold; also to have and keep in force a fire insurance risk * * * for the benefit of said S. W. McGinness, until the entire purchase money has been paid or the notes lifted.

"It is also distinctly understood and is to be considered a part of this agreement, that in case any of the foregoing obligations remain unpaid for a period longer than thirty days after ma-

turity, that the amounts previously paid are forfeited to the said S. W. McGinness, the party of the first part, who is empowered in that event to enter upon and to take possession of said premises without let or hinderance from said R. S. Thompson. Further the said S. W. McGinness does not agree to make a full transfer of the said leasehold until the entire amount of purchase money or obligations given are paid, but when such obligations are paid, then the said S. W. McGinness binds himself, his heirs and assigns to make as full and complete a transfer as is vested in himself."

On the trial, before EWING, P. J., it was admitted that Thompson took possession April 20, 1875; that McGinness re-entered upon and took possession of the premises about April 14, 1876, and that all of the purchase money notes, due at the time of re-entry and forfeiture, were paid. Defendant claimed that he had re-entered by consent of plaintiff; and also that the ground-rent, taxes and insurance had not been paid according to the agreement, which justified a re-entry under the forfeiture clause for the breach.

The court, in charging the jury, said: "Counsel for defendant claims that the term obligations in the sentence, 'pay these obligations within thirty days of the time of their maturity,' includes not only the notes given, but the ground-rent that was to be paid to the paramount landlord, the taxes and the insurance premium. We do not so construe the agreement. We think it is to be taken more strictly and that it merely means the notes of Thompson that were given in payment. If then you find that these notes due had all been paid, there was no cause of forfeiture at the time that Mr. McGinness entered, he would have no right to enter except by consent of the parties."

Verdict in favor of plaintiff for \$2,000, which was reduced to \$1,500 and judgment entered thereon.

For plaintiff in error, *L. B. Duff, Esq.*
Contra, Messrs. Wm. Yost and J. E. Shaw.

PER CURIAM. Filed October 24, 1881.

The four assignments of error all complain in different forms of the construction which the learned court below put upon the agreement between the parties dated April 20, 1875. The article provided for the payment by Thompson of certain notes, falling due at different dates, given by him for the purchase money of the premises; also that he would pay all ground-rent and taxes and keep in force a fire insurance risk, and then adds: "It is also distinctly understood and is to be considered a part of this

agreement, that in case any one of the foregoing obligations remain unpaid for a period longer than thirty days after maturity, that the amounts previously paid are forfeited to the said S. W. McGinness, the party of the first part, who is empowered in that event to enter upon and take possession of said premises without let or hinderance from said R. S. Thompson."

The learned judge was of the opinion that the word "obligation" in this clause was limited to the notes given for the purchase money, and in this opinion we concur. How could ground-rent and taxes previously paid be forfeited, and when did the obligation to keep the fire insurance risk mature? The word maturity evidently pointed to the promissory notes. To justify an entry, the breach of the condition should not be at all doubtful.

Judgment affirmed.

McLAUGHLIN et ux., Defendants Below, v.
McKEE.

A judgment entered against terre-tenants of land, bound by a mortgage, attached by a creditor of the mortgagee, which provides that in case the garnishee refuses or neglects, on demand by the sheriff, to pay the amount of the mortgage which is the subject of the attachment, then the same to be levied of land of the garnishee covered by the mortgage is properly entered.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

George McKee obtained judgment against James Kelly and issued an *execution attachment* summoning Jemima McLaughlin and her husband.

In answering the interrogatories filed, McLaughlin and wife stated substantially that Delmont Jones bought a farm, taking the deed in the name of his daughter, Jemima McLaughlin, and that at the time Jones bought the farm it was subject to a mortgage, the last installment of which had been assigned to James Kelly; that they did not know how much of that installment had been paid, excepting by two receipts, and the fact that they had been informed that James Kelly only claimed \$864 with interest, which was less than the difference between the installment and the receipts. Upon this answer the plaintiff obtained judgment for \$864 with interest, the judgment providing that the debt should be paid out of the sum due the defendant, as attached in the hands of the garnishees as admitted by their answers, and if the garnishees refuse or neglect, on demand by the sheriff, to pay the same, then same to be levied of land of said Jemima covered by said mortgage, according to law. Subsequently

the latter judgment was assigned to Robert Stevenson, and the garnishee took this writ of error, assigning as error the action of the court in entering judgment against them.

For plaintiffs in error, defendants below,
Messrs. Whitesell & Son and Thos. M. Marshall.
Contra. W. S. Wilson, Esq.

PER CURIAM. Filed November 14, 1881.

The judgment against garnishees in an attachment execution is in all cases a special one, and the mode of enforcing it is provided by law. In this case it was expressly provided in the judgment that if the garnishees refused or neglected, on demand by the sheriff, to pay the amount of the mortgage, which was the subject of the attachment, "then same to be levied of land of said Jemima, covered by said mortgage, according to law." This is the proper mode of entering judgment against terre-tenants of land, bound by a mortgage, attached by a creditor of the mortgagee. We find no error in this record of which the plaintiffs in error have any right to complain. *Judgment affirmed.*

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THE POOR DISTRICT OF BEAVER TOWNSHIP, Defendant Below, v. THE POOR DISTRICT OF ROSE TOWNSHIP.

A volunteer payment by a tax collector in the settlement of his duplicate does not give a settlement to a person charged with a tax, under the second clause of Section 9 of the Poor Act of 13th June, 1836, P. L., 542. To obtain a settlement under the third clause of the same section of the act, the person must take a lease, the premises leased must be of the yearly value of \$10, he must dwell in the house for one whole year and pay said rent.

An occupancy of another house, before the expiration of the year, belonging to the same owner, but without his permission and without payment of rent, cannot be tacked to the occupancy of the first house so as to give the person a settlement.

Butler v. Sugarloaf, 6 Barr, 262, and Allegheny City v. Allegheny Township, 2 Harris, 138, distinguished.

Error to the Court of Quarter Sessions of Jefferson county.

Opinion by MERCUR, J. Filed November 21, 1881.

The question presented by the first assignment is substantially this: In case the collector in settlement of his duplicate, pays a tax which he has not collected, does such payment give to the person charged with the tax a settlement with like effect as if he himself had paid it?

When a person seeks to establish a settlement by the payment of taxes, the Act of 1836 requires he "shall be charged with and pay his proportion of any public taxes or levies for two years successively." As it was held, in *Butler v. Su-*

garloaf, 6 Barr, 262, that payment of rent by a surety was payment by the lessee so as to give a settlement to the latter, it is, therefore, claimed that payment of a tax by the collector should give a settlement to the person charged with the tax. We think the cases differ widely. In the former a contract relation was created between all the parties at the execution of the lease. The lessee and his surety assumed an obligation at the same time to pay the same debt. That was, if the former did not pay, the latter would. The lessee was to pay through another if he did not do it personally. It was, therefore, held a payment by the surety was in law a payment by the lessee. It was a payment of the rent according to the agreement under which the tenancy was created. It was paid to the lessor by one of the two persons who agreed to pay him. The payment was in fulfillment of the agreement and to discharge the claim of the lessor against the lessee and his surety. It was not a voluntary payment. In the present case the payment by the collector was voluntary so far as Hetrick, who was charged with the tax, was concerned. He made no agreement with the collector for its payment. It was not only paid without his request, and without his knowledge; but apparently for one of the two years, contrary to his wishes. The evidence is that in the fall of 1872 Hetrick said to the collector he would not pay any taxes. The contention is in regard to the payment of taxes for 1872 and 1873. The collector made a general payment of all the taxes mentioned in his duplicates for those years, and the small tax against Hetrick, not having been exonerated, was covered by this payment. It was in no sense such a payment by Hetrick, who appears to have had no property, as the statute requires to give him a settlement. The second assignment falls with the first.

The third assignment is that the court erred in not finding certain facts therein specified. The court certified all the evidence relating thereto. It is claimed that this evidence proves a settlement under the clause of the act which declares one may be gained in a district "by any person who shall *bona fide* take a lease of any real estate of the yearly value of ten dollars, and shall dwell upon the same for one whole year, and pay the said rent."

Thus four distinct things are necessary. He must take a lease; the premises leased must be of the yearly value of ten dollars; he must dwell thereon for one whole year, and pay the said rent. Nothing less than a compliance with all of these requirements satisfies the statute. Each of them was questioned. The plaintiff in error

seeks to establish them by the arrangement under which Hetrick occupied a house in Rose township. In November, 1871, he entered into a written agreement by which he was to clear and fence eleven acres of land at a specified sum per acre, and the job was to be finished sometime in September following. About the same time there was a verbal arrangement between them by which Smothers was to furnish lumber for Hetrick to build a small house in which he might live while doing the work. Smothers furnished the lumber, and either Hetrick by himself or jointly with his son built the house and occupied it while at work at the job. Hetrick moved out of the house and left it about the first of September following, and the job was completed on or before the 15th September.

The evidence did show the annual rental of this house was of the yearly value of ten dollars, and that the labor of Hetrick in building it may have exceeded that sum; but it signally failed to show that he dwelt therein for one whole year. An attempt is made to fill out the year by showing he afterwards dwelt in another house of Smothers, in the same township. It does appear that some two months after he moved out of the former house, he did enter into and occupy for sometime a log-house of Smothers, in the same township, but this he did without any arrangement with the owner and without his permission. He took no lease and paid no rent therefor. On no principle can such an occupancy be tacked to the occupancy of the other house to make a full year. It was not a continuous dwelling for one year in the township, nor was the occupancy of the last house under either an express or implied lease. Hence the case of *Allegheny City v. Allegheny Township*, 2 Harris, 138, does not apply. There the pauper had resided one continuous year in the city of Allegheny, although in different houses, yet in each under a contract to pay rent, and in the aggregate did pay more than ten dollars rent. He was all the time dwelling in some house under a stipulated rental. The whole evidence shows Hetrick was not, in any view of the case, under a rental more than ten months, and beyond that he was merely a trespasser. Hence the third assignment is not sustained.

The fourth assignment has no merit and was not pressed. The learned Judge committed no error in affirming the order of removal.

Judgment affirmed.

For plaintiff in error, defendant below, *Messrs. Conrad & Mundorff, White & Scott and Gordon & Corbet.*

Contra, Messrs. Jenks & Clark.

**ARMSTRONG COUNTY, Defendant Below, v.
JACOB COLEMAN, for use.**

The Act of 25th May, 1878, P. L., 147, which provides for the payment of orders drawn by military boards on the county treasurers under the Act of 4th May, 1864, and in existence at the date of the repeal of the latter act by the Act of 15th April, 1873, is constitutional.

It does not impose a new debt or obligation upon the county which it did not owe, but is an exercise of the taxing power of the Commonwealth.

Error to the Court of Common Pleas of Armstrong county.

Opinion by PAXSON, J. Filed November 14, 1881.

We are in no doubt as to the constitutionality of the Act of Assembly, approved May 25, 1878, entitled "An Act to provide for the payment of existing orders drawn by the military boards of the several counties of this Commonwealth:" P. L., 147. The object of the act is so fully set forth in the preamble that I give it entire:

WHEREAS, Previous to the Act, approved the 15th day of April, 1873, entitled "A further supplement to the Act of 4th May, 1864, entitled 'An Act for the organization, discipline and regulation of the militia of the Commonwealth of Pennsylvania,'" the military boards of the several counties of this Commonwealth has power to draw their orders on the county treasurer of the proper county, in payment of the necessary expenses of the military organizations of the county:

And whereas, By the then existing laws, provisions were made for the payment of orders so drawn:

And whereas, By the 9th Section of said Act of 15th April, 1873, all means for the payment of such orders was repealed:

And whereas, On the said 15th of April, 1873, and prior thereto, there were in existence in several of the counties of this Commonwealth, outstanding orders drawn by the military boards aforesaid, which in good faith should be paid, therefore, etc.

The act then provides that all such outstanding orders shall be paid by the respective counties out of the general county funds.

At the time the order, which is the subject of the present controversy, was drawn, it was the duty of the county treasurer to have paid it out of a special fund raised by the military tax which was laid *per capita* on those persons who were liable to military duty, but who failed to perform it. See Sections 4 and 5 of the Act of 7th April, 1870. The Act of 15th April, 1873, repealed the *per capita* tax and thus destroyed the fund out of which the orders had theretofore been paid. Next in order of time came the decision of this court in *Wyoming County v. Bardwell*, 3 Norris, 104, [25 PITTSBURGH LEGAL JOURNAL, 159], (decided in 1877), in which it was held that the county was not liable for the payment of such orders. This was followed by the Act of 1878, above referred to, which was

plainly intended to furnish a remedy in lieu of the one which had been taken away by the Act of 1873. The difference between the remedies is this: The Act of 1870 imposed the liability upon a portion only of the citizens of the county, while the Act of 1878 imposed it upon the entire body of the county. The services of this military company had been performed, and the liability incurred before the repealing Act of 1873 was passed. It was the duty of the county treasurer then to have paid it; not indeed out of the general county funds, but out of the particular fund before referred to. The Act of 1878 cannot, therefore, be said to impose a new debt or obligation upon the county which it did not owe. Nor is the change of remedy open to criticism. It merely laid the burden upon all the citizens of the county, instead of upon a few. The Act of 1878 was an exercise of the taxing power of the Commonwealth and is not obnoxious to any constitutional provision.

It follows from what has been said that the rulings of the learned judge of the court below were entirely accurate, and his judgment, therefore, must be affirmed.

For plaintiff in error, defendant below, *E. S. Golden, Esq.*

Contra, Messrs. M. F. Leason and J. Gilpin.

SARAH PORTER, Defendant Below, v. C. A. HITCHCOCK.

Where land bound by a judgment is sold, and within five years from the date of such judgment a *scire facias* to revive and continue the lien thereof is issued against the grantor, on which a judgment is entered, an *alias scire facias* issued within five years from the date of issuing the original *scire facias*, and served upon the terre-tenant, will continue the lien on the land.

The right of a terre-tenant to notice, in proceedings to revive a judgment, commences only from the date of recording his deed, or taking actual possession of the property.

Error to the Court of Common Pleas of Erie county.

On the 14th of March, 1876, Sarah Porter purchased from Philo Huntley a house and lot in the borough of North East, and paid the purchase money in full. At the time of the purchase there was a judgment of \$400 against the land in favor of C. A. Hitchcock. This judgment was entered October 6, 1875. On the 23d of November, 1877, a *scire facias* was issued to revive and continue the lien of said judgment against Huntley. The writ was against Huntley alone, and served only on him. January 13, 1879, judgment was entered on the *scire facias*.

March 7, 1881, an *alias scire facias* was issued, directed to Sarah Porter; April 9th served; May 19, 1881, a judgment was entered against her for want of a sufficient affidavit of defense.

For plaintiff in error, defendant below, *Messrs. E. A. Walling and Davenport & Griffith.*

Contra, Messrs. J. C. Brady, G. A. Allen & L. Rosenzweig.

Opinion by GORDON, J. Filed November 7, 1881.

When Sarah Porter, the terre-tenant, bought the Huntly property it was charged with the lien of the plaintiff's judgment, which was entered on the 8th of October, 1875. On the 23d of November, 1877, a *scire facias* was issued on this judgment, which was served on Huntly, but not on the terre-tenant. On this *scire facias* there was a judgment entered against Huntly on the 13th of June, 1879, and was followed by an *alias scire facias* which was served on the defendant, April 9, 1881, within five years from the date of the issuing of the original *scire facias*. The learned judge of the court below thought this was in time to charge the property of the terre-tenant, and so ruled.

In this he is supported by the Act of 1827, and by the cases of *Mason's Estate*, 4 Watts, 431; *Silverthorne v. Townsend*, 1 Wr., 263; *Davidson v. Thornton*, 7 Barr, 128; *Lichty v. Hochstetler*, 10 Nor., 444 and *Kirby v. Cash et al.*, 27 PITTSBURGH LEGAL JOURNAL, 258.

Some reference has been made by the counsel for the defendant to the Act of 1849, but we think it singular that this act should be cited as putting the terre-tenant in a position superior to that of the judgment debtor, or to that possessed by such tenant under the Act of 1827. The very contrary is the fact. The Act of 1849 was obviously passed to meet the case of *Armstrong's Appeal*, 5 W. & S., 352, wherein it was held that under the Act of 1827, the terre-tenant must be made a party to the revival of the judgment though his deed was not on record. The Act of 1849 so far alters this rule that a revival of the judgment against the original debtor will bind the terre-tenant unless he has put his deed on record, or is in the actual possession of the land, and his right to notice now commences only from the date of such record, or time of such possession. In other words, by complying with the terms of this act, he entitles himself to the notice prescribed by the Act of 1827, otherwise he is entitled to no such notice, and his land continues to be bound by the lien of the original judgment as long as it is kept revived against the original debtor.

Judgment affirmed.

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PITTSBURGH, PA., MAY 3, 1882.

Supreme Court, Penn'a.

JOHN H. HARE, to use, Plaintiff Below, etc., v.
A. W. BEDELL.

Under the Act of 16th June, 1836, in order to recover against a defaulting purchaser at sheriff's sale, the difference of price on resale, the plaintiff must prove the resale by producing a formal sheriff's return and deed, in pursuance thereof, duly executed and acknowledged in court.

A short return in these words: "For return of this writ, see *feri facias* No. 205 July Term, 1876, so answers R. H. Fife, sheriff;" is not a formal return, and when the special return thus referred to certifies that "by virtue of this writ," etc., "I," etc., "sold the same," etc., although the sheriff's distribution reported awards payment of the debt, interest and costs on the writ having the short return, without exception thereto, yet the two returns construed together do not import a sale on the writ having the short return, but import on the contrary a sale exclusively on the writ, certifying "by virtue of this writ," etc., so that parol evidence is inadmissible to contradict it by proving a sale on both writs jointly.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

Action on the case by John H. Hare, for use of Joel Bedell, for use of Margaret J. Bedell, his wife, against A. W. Bedell, defaulting purchaser of certain lands sold at sheriff's sale to recover the difference between \$5,050 bidden by him and \$4,500 realized on resale with costs, etc.

On trial plaintiff proved two judgments with waiver of inquisition, condemnation and exemption. One entered September 25, 1874, at the suit of W. & R. Caughey against Joel Bedell, and one entered December 16, 1874, at the suit of William Whigham against Joel Bedell. Also an intervening conveyance of the land in question by Joel Bedell to his wife, Margaret J. Bedell, the plaintiff, by deed dated November 19, 1874. Also an execution on the Caughey judgment and sale of the property thereon on October 9, 1875, to the defendant; the default of the defendant to pay the purchase money and the return of the land as unsold. Also a *pluries fieri facias* No. 206 July Term, 1876, on the Caughey judgment to which was annexed a levy on the land and on which was indorsed the following return: "For return of this writ, see *feri facias* No. 205 July Term, 1876, so answers R. H. Fife, sheriff." Also a *pluries fieri*

facias No. 205 July Term, 1876, on the Whigham judgment, in the hands of the sheriff at the same time, to which was annexed a levy on the land, and on which was indorsed a full return, certifying that by virtue thereof R. H. Fife, sheriff, on July 7, 1876, sold the land to William Bedell for \$4,500, and had received from the purchaser \$2,794.55 cash on account and applied the same "to the costs on this writ, and on *feri facias* No. 206 July Term, 1876," and to the costs and debts on other judgments. And had taken the receipt of the purchaser for \$1,705.45, "the balance in full of said purchase money, being in full of *his debt and interest on judgment* No. 311 November Term, 1874, *William and Robert Caughey, for use, v. Joel Bedell*" and other judgments, "they appearing from the list of liens to the first liens upon the property sold." Also the exceptions of Margaret J. Bedell to the sheriff's distribution thus made, in which, admitting the right of the Caughey judgment to be satisfied out of the money made, she denied the right of the Whigham judgment and all others to participate, and claimed the balance of the money made by virtue of the deed to her. Also the auditor's report, reciting the sale to William Bedell "on the above *feri facias* and *feri facias* No. 206 July Term, 1876, *W. & R. Caughey, for use of William Bedell, v. Joel Bedell*," and sustaining the exceptions of Mrs. Bedell and awarding her the balance claimed, with the decree of the Court of Common Pleas, No. 2, of Allegheny county confirming the auditor's report and the decisions of the Supreme Court in appeals of William Bedell and H. B. Sinclair, creditors of Joel Bedell, affirming the decree of the Court of Common Pleas, No. 2. Plaintiff proved that the sale to the defendant was a cash sale, and R. H. Fife (ex-sheriff), by whom said executions Nos. 205 and 206 were executed and returned, being on the witness stand plaintiff offered to prove by him that the land was sold on both of said writs, as follows:

"2. Will you look at those returns to executions Nos. 205 and 206 July Term, 1876, and state whether the property was sold on both of those writs? Objected to as incompetent and irrelevant, that the record is the best evidence. Objection sustained and bill of exceptions sealed for plaintiff." Plaintiff then rested.

The defendant offered in evidence the sheriff's deed to William Bedell, which recited only a sale on the Whigham judgment and rested.

The defendant requested the court to charge the jury as follows:

"2. That the first sale, at which defendant bid \$5,050 was made on execution No. 539 October Term, 1875, issued on the judgment of Wil-

liam and Robert Caughey against Joel Bedell, No. 311 November Term, 1874, entered September 25, 1874. And this judgment being prior in date to the deed to Margaret J. Bedell (November 19, 1874), that sale if completed would have extinguished the title of Margaret J. Bedell as well as the lien of all judgments against Joel Bedell prior to her deed. And the last sale to Wm. Bedell, for \$4,500, appearing by the sheriff's return and deed to him to have been made on execution No. 205 July Term, 1876, at the suit of William Whigham, for use, on judgment No. 183 January Term, 1875, entered December 16, 1874, after the date and record of the deed from Joel Bedell to his wife, Margaret J. Bedell, that sale would only pass a right to the purchaser to contest her title under her deed on the ground of fraud, and would not discharge the lien of any judgments against Joel Bedell prior to the date of her deed. And if she consented to treat this last sale as if it had been made on execution No. 206 July Term, 1876, then in the sheriff's hands at suit of Wm. and R. Caughey, on judgment No. 311 November Term, 1874, and claimed and received by virtue of her deed the balance of purchase money after prior liens, such distribution would not bind this defendant who was not a party thereto. But the amount thus applied to liens prior to her deed, \$788.40, added to the price bid at the last sale, \$4,500, would make \$5,288.40, an amount greater than this defendant bid at the first sale, \$5,050. And if she chose to relinquish her claim of title to the land after this last sale, and take the proceeds of this sale after discharging prior liens, \$788.40, she cannot recover against this defendant in this action; for if she had not chosen to participate in the distribution of the proceeds of the last sale she would not have been affected by it if her title was not fraudulent as against the creditors of her husband." *Answer*—Affirmed.

"3. This defendant not being a party to the controversy about the distribution of the money arising from the last sale is not affected in any way nor bound by the decree of court therein. And the last sale on execution No. 205 July Term, 1876, being of a different and less valuable title than that on execution 539 October Term, 1875, on which defendant bid, he cannot be charged with the difference between them for not making his bid good." *Answer*—Affirmed.

The court charged: "Under the evidence the defendant is entitled to your verdict."

These instructions and charge were assigned for error.

For plaintiff in error, *Joseph Forsythe, Esq.*

Such construction should be put upon both of these sheriff's returns as will conform with

the presumption that the sheriff has done his duty: *Phillips v. Kuhn*, 7 Phia., 146. His plain duty was to sell on both writs.

The court below held that the return to the Caughey execution imported nothing or was void for uncertainty, but *id certum est quod certum reddi potest*. And even the King's grant shall not be void for uncertainty if it refers to another thing which is certain: *Broom's Legal Maxims*, 419. This maxim is peculiarly applicable in construing a written instrument: *Ibid.* 418. It was applied in *Clippinger v. Miller*, 1 Pen. & Watts, 72, to a judgment in *scire facias* to ascertain the amount.

Instruments connected together by reference from one to the other are to be read together: *Kennedy v. Ross*, 1 Casey, 256; 2 Parsons on Contracts, *503, note and cases there cited.

The returns to the Whigham and Caughey executions are inseparably linked together, they mutually refer to each other. Each is unintelligible without the other. There is in fact but one return, *mutatis mutandis*, to both these writs. It is indorsed *in solido* on the Caughey writ, *in extenso* on the Whigham writ. The practice of sheriffs when holding several writs against the same defendants, levied on the same land, indorsing on the writ first in their hands a return *in extenso*, and upon all the others a return *in solido*, by reference to the first, is as old as the records of the Common Pleas of Allegheny county. The 94th Section of the Act of 16th June, 1836, confirms that practice, for to it applies the language "in the manner hitherto practiced in case of the sale of lands by sheriffs upon execution."

The latent ambiguity in the Whigham return, disclosed by proof of the conveyance intervening the judgments, is inexplicable, but by reference to the Caughey sale, return, execution and judgment. The Whigham return is a special return under the Act of 20th April, 1846, and the adjudication of the questions raised by the exceptions, to wit: the validity of the title of Mrs. Bedell and its divestiture, being conclusive alike against Joel Bedell, his wife, and his creditors, including William Bedell as owner of the Whigham judgment, and in favor of William Bedell as owner of the Caughey judgment and purchaser at the last sale is necessarily equally conclusive as against A. W. Bedell, the defendant, as defaulting purchaser at the first sale.

The exceptions and subsequent proceedings are part of the return to the Whigham execution, which is an entirety, and must be so construed as that all its parts may stand together. And at all events, as it established for the pur-

pose of distribution that the land was sold on the Caughey writ, it cannot possibly now establish the contrary that it was sold on the Whigham writ only, so as by contradiction to exclude parol evidence of the facts.

A sheriff's sale is not within the Statute of Frauds, and may be proved otherwise than by the production of a formal return: *Emley v. Drum*, 12 Casey, 123.

What property is embraced in a levy, which is obscure in its terms, may be shown by parol, and it is a question for a jury: *Scott v. Shealey*, 3 Watts, 50; *Hoffman v. Danners*, 2 Harris, 25.

Though inadmissible to contradict or vary a sheriff's return, yet where ambiguity exists in it parol proof of facts, consistent with and not appearing on the face of the return, may be heard in explanation, and to show the truth of the case, *Shoemaker v. Ballard*, 3 Harris, 92.

In *Titusville Novelty Works' Appeal*, 27 P. F. Smith, 103, the sheriff's return showed a levy on "D'Shoup farm." Parol evidence was admitted showing that the leasehold actually levied on was not the "D'Shoup farm," but on land of the Ditman heirs.

Contra, C. Hasbrouck, Esq.

Opinion by STERRETT, J. Filed November 7, 1881.

It is very clear that a defaulting purchaser at sheriff's sale is not liable to respond in damages for loss on resale of the property, if it appears that under the first sale he would have acquired a more valuable title than that which passed to the purchaser at the last sale, or that the terms of the first sale were more advantageous to the purchaser than those of the resale. The obvious reason of this is, that the inferior quality of title, or the less advantageous terms of sale would naturally effect a reduction of price, and we would be left without any reliable standard by which to measure the loss sustained by the refusal of the purchaser at the first sale to make good his bid.

The main ground of defense in this case was, that the title sold and conveyed at the last sale was far inferior in quality to that which would have passed to the defendant by the first sale, if he had paid his bid and received a deed. The first sale was by virtue of an execution based on the Caughey judgment against Joel Bedell, entered September 25, 1874, prior to the conveyance of the property by the defendant in that judgment to his wife. It is, therefore, clear that if the sale had been consummated it would have extinguished the title of Mrs. Bedell, as well as the lien of all judgments against her husband, entered prior to the date of his

conveyance to her. If the last sale was made solely on the Whigham judgment, entered December 14, 1874, after the conveyance to Mrs. Bedell, it would pass to the purchaser only the right to contest her title, under the deed from her husband, on the ground of fraud, and would not discharge the lien of any judgments entered against him prior to the date of the conveyance: *Byrod's Appeal*, 7 Casey, 241; *Fisher's Appeal*, 9 Id., 294, and *Hoffman's Appeal*, 8 Wright, 95. The following special return is indorsed on the Whigham writ, viz: "I do certify that by virtue of this writ, to me directed, etc., I did expose the premises within described to sale by public vendue or outcry, and * * * sold the same to William Bedell for \$4,500," etc. His deed to the purchaser also recites the Whigham judgment, execution and sale by virtue thereof, and makes no mention of any other judgment or execution. Upon this state of facts it cannot be doubted that the quality of the title acquired by the purchaser is far inferior to that which would have passed to the defendant if the sale to him had been consummated. To meet the difficulty thus presented, the plaintiff relied on the fact that there was in the sheriff's hands, at the same time, a *pluries* writ on the Caughey judgment, above mentioned, on which the following return was indorsed: "For return of this writ, see *fi. fa.* No. 205 July Term, 1876." The execution thus referred to is the Whigham writ. In connection with this the plaintiff offered to prove by the sheriff that the sale was in fact made on both writs, but the learned judge excluded the testimony as incompetent, and in so doing we think he was clearly right. When the return of the sheriff and the recitals in his deed show a sale on one writ only, it would be a dangerous precedent to permit him or any one else to come in on the trial of a cause and prove that the sale was also made on another writ at the same time. To do so would greatly impair the security of titles based on sheriff's sales, and at the same time encourage official carelessness, of which there is quite enough already.

The Act of June 16, 1836, prescribing the manner in which judicial sales of real estate shall be evidenced, requires that "the officer making sale of any real estate under execution * * * shall make return thereof, indorsed on or annexed to such writ, and give the buyer a deed duly executed and acknowledged:" *Purdon*, 658, pl. 119. In thus requiring that the return shall not only be in writing, but also indorsed on or annexed to the writ, and that the sale shall be further evidenced by a deed to the purchaser, it was surely not contemplated that the

return so made might afterwards be explained by parol testimony to mean something else. The Act of April 21, 1846, makes ample provision for the correction or amendment of defective or informal returns: Purdon, 659, pl. 130. After the trial of this case, the return in question was amended, in the regular and orderly way, at the instance of the defendant; but that cannot affect the question under consideration. It was not amended at the time of the resale. The state of the record, as it then stood, was such as to admonish bidders that the quality of the title then offered was inferior to that which would have passed by the first sale, and consequently the property would probably bring less than it did at the first sale.

For these and other reasons that might be added, we are of opinion that the testimony offered by the plaintiff was rightly excluded.

Judgment affirmed.

MERCUR, J., dissents, as there was amply sufficient to amend by, and the parol evidence should have been received.

ANGIER, Plaintiff Below, v. EATON, COLE & BURNHAM CO.

Where the evidence is such that a court would not sustain a verdict that should find against it, it is not error for the court to practically rule that there was no disputed question of fact for the jury to determine, instead of submitting the evidence to the jury.

While the patent is apparently valid, and the licensee is enjoying the benefit of its supposed validity, he is bound to pay the stipulated royalty, and cannot set up as a defense the actual invalidity of the patent; but when, in addition to the invalidity of the patent, by reason of a prior outstanding patent for the same invention, it is shown that the owner of the prior patent is asserting his exclusive rights thereunder by supplying the market with the patented article, forbidding all interference on the part of others, etc., and the licensee under the invalid patent is deprived of the enjoyment of the monopoly for which he contracted, and in consideration of which he agreed to pay the royalty, he may defend on the ground of the actual failure of the consideration.

Error to the Court of Common Pleas of Venango county.

Opinion by STERRETT, J. Filed January 2, 1882.

The general inquiries, suggested by the assignments of error in this case, are, whether there was any question of fact that should have been submitted to the jury; and, if not, whether upon the facts established by the uncontradicted evidence, the defendant was entitled to a verdict. Both of these questions will be more readily answered by briefly noticing some of the more prominent facts disclosed by the testimony.

By assignment from the patentee the parties to this suit became joint owners of certain let-

ters patent, issued October 11, 1864, to Frederick Crocker, for an "improvement in lifting pumps," better known in the oil producing business as the "Crocker Check Valve;" and, on March 11, 1876, they entered into a written agreement by which the plaintiff granted to the defendant company "the exclusive right and privilege to manufacture and sell the 'Crocker Check Valve,' a patented invention." In consideration thereof the defendant agreed to manufacture the "valves in sufficient quantity to supply the demand therefor;" to render an account of sales monthly and pay the plaintiff two dollars and fifty cents for each valve sold. The defendant accounted and paid for all valves manufactured and sold prior to September, 1876, at which time it was formally notified that by the manufacture and sale of the valves it was infringing letters patent issued to James Old, February 18, 1862, more than two years prior to the date of the Crocker patent. The plaintiff was thereupon informed of this fact and further payment of royalty was refused. In November, 1876, a bill in equity was filed by James Old in the Circuit Court of the United States for the Western District of Pennsylvania, against the defendants, charging the infringement of his patent and praying for assessment of damages, etc. This suit was discontinued in January, 1879, after the defendants had been subjected to great outlay in defending the same. The present action was brought on the contract, in July, 1878, to recover the stipulated royalty on 1201 valves which the defendant manufactured and sold from September, 1876, to date of suit. The substance of the defense, as shown by the pleadings, was that the consideration, for which the company agreed to pay the royalty in question, had wholly failed; that the supposed patent under and by virtue of which it was to have and enjoy "the exclusive right and privilege to manufacture and sell the Crocker Check Valve, was invalid by reason of the prior patent for a new invention precisely the same, in principle, in mode of operation and in the results produced, as that covered by the Crocker patent; that check valves, identically the same, and used for the same purposes as those made and sold by the defendant under the contract in suit, were manufactured and sold by licensees of James Old, the original patentee; that neither defendant nor plaintiff could prevent said licensees from manufacturing and selling the valves; that the competition thus existing in the market required defendant to reduce the price of the valves, and in consequence thereof, its profits were several thousand dollars less than they would have been if it had enjoyed the exclusive

right and privilege contemplated by the contract. These and other allegations on which the defense was based were clearly proved by testimony that was neither contradicted nor in any manner impeached.

The learned judge, after reciting the facts thus established, instructed the jury to find for the defendants. In this it is claimed by the plaintiff that there was error.

It is very evident from an examination of the respective letters patent that in every essential particular the "Crocker Check Valve" is the same mechanical device that is described in and covered by the patent previously granted to James Old, and hence the court was right in thus construing these instruments of evidence. There is nothing in the verbal testimony that conflicts therewith; on the contrary, the testimony of the experts is in full accord with the views expressed by the court. Nor is there anything in the defendant's answer in the equity suit that would justify any other conclusion. So far as the substantial identity of the valves is concerned, the evidence was all one way, and there was no question of fact for the jury to pass upon. There was really no dispute as to any of the material facts which the court treated as having been established by uncontradicted evidence. It is true the court might have submitted the testimony to the jury, but under the circumstances there was no error in not doing so. As was said by WOODWARD, C. J., in *Eister v. Paul*, 4 P. F. Smith, 196, "where the evidence is all one way, and is so satisfactory that a court would not sustain a verdict that should find against it, we will not reverse the judgment because the judge declared the true effect of the evidence instead of submitting it to the jury." There was no error therefore in practically ruling that there was no disputed question of fact for the jury to determine.

The next question is, whether the court erred in holding, as matter of law, that upon the facts established by undisputed evidence the defendant was entitled to a verdict.

It cannot be doubted that the sole consideration for defendant's agreement to pay two dollars and fifty cents for each valve manufactured and sold was "the exclusive right and privilege to manufacture and sell." That right was in the nature of a monopoly, and so long as it was enjoyed, the defendant was bound to pay, and did pay, the consideration therefor; but when, by reason of something beyond the company's control, in other words, without any fault of the defendant, it was deprived of that exclusive right, why should it be compelled to pay the stipulated royalty? When the agreement was

executed the Crocker patent was no doubt regarded, at least by the company, as valid, and therefore sufficient to protect it in the enjoyment of the exclusive right intended to be secured by the contract. Whatever knowledge to the contrary the plaintiff may have had, he evidently assumed, in bargaining with the defendant, that the valve was a patented invention, covered and protected by the Crocker patent; and, in consideration of the royalty, he expressly granted the exclusive right therein specified. In its legal effect, the agreement is a license to manufacture and sell the valves, but it is of such an exclusive character as practically to amount to a monopoly; and while it was enjoyed as such, the invalidity of the patent, without more, was no defense to the payment of the royalty. The recognized principle applicable to such licenses is, that while the patent is apparently valid, and the licensee is enjoying the benefit of its supposed validity, he is bound to pay the stipulated royalty, and cannot set up as a defense the actual invalidity of the patent; but when, in addition to the invalidity of the patent, by reason of a prior outstanding patent for the same invention, it is shown that the owner of the prior patent is asserting his exclusive rights thereunder by supplying the market with the patented article, forbidding all interference on the part of others, etc., and the licensee under the invalid patent is deprived of the enjoyment of the monopoly for which he contracted, and in consideration of which he agreed to pay the royalty, he may defend on the ground of the actual failure of the consideration: *Marston v. Sweet*, 82 N. Y. Rep. 527. That was a suit by a patentee against his licensee to recover royalty, in which the defense was failure of consideration; and the court say, "the substantial consideration to uphold these royalties was the transfer to defendants of a monopoly, the right to an exclusive use, and we see at once that the evidence offered tended to show the total failure of that consideration. * * * It is impossible not to see that if the plaintiff's theory should prevail, these defendants might be liable at one and the same time to pay royalties to the plaintiff, who had no patent, and to Goodfellow, who had. The injustice of such a result makes us slow to believe that any rule of law requires us to sustain it."

This observation applies with equal force to the case before us. It follows from what has been said that there was no error in directing a verdict for the defendant.

Judgment affirmed.

For plaintiff in error, *Roger Sherman, Esq.*
Contra, H. D. Hancock, Esq.

WILLIAM F. RUMBERGER et ux., in Right of the Wife, Plaintiffs Below, v. EDWARD S. GOLDEN.

A promise to pay the legal rate of interest made before a debt becomes due, or after, or a part payment of an overdue debt, is not a good consideration to support a contract to give time. There must be a change in the contract relation involving some advantage to one party or disadvantage to the other.

Error to the Court of Common Pleas of Armstrong county.

Opinion by TRUNKY, J. Filed November 14, 1881.

Shortly after the note became due the parties agreed that the maker should have the money for ten years from the date of the original loan, June 1, 1877, at six *per centum* interest. The note had been and was bearing the same rate. The maker wanted to pay it, the holder wanted him to keep the money because she could not loan it to the bank or commissioners at that rate, and their negotiations resulted in the agreement for extension of time for payment. What was the consideration in this arrangement? It has been decided, none at all: *Partridge v. Partridge*, 2 Wr., 78. In that case, before the debt became due, the parties agreed that the time of payment should be extended to certain dates, the money to bear interest at the rate of six *per centum* per annum, and when due the debtor was to deposit it in specie, in a bank in Pittsburgh, and send the certificate to the creditor who resided in Ohio. This was held to be *nudum pactum*, for it was already the contract relation of the parties. Having been made before the debt was due, it was deemed of like effect as if made after, though in many cases a contract made before, would be binding, which would not, if made after; as where a creditor, in consideration of the payment of interest in advance, agrees before the debt has become due, to extend the time for payment.

Payment of usury after the maturity of a note is a payment which may be applied on the debt, which payment the debtor was under obligation to make, and therefore is not a consideration for a contract; but payment of part of a debt before due is a consideration sufficient to support a contract to give time: *Hartman v. Danner*, 24 P. F. Smith, 36. Where lawful interest, together with usurious, was paid on a debt past due, it was not a consideration for a new contract as to time of payment of the debt: *Shaffer v. Clark*, 9 Norris, 94. These cases rest on a similar principle as *Partridge v. Partridge*, *supra*, namely, that a promise to pay the legal rate of interest made before a debt becomes due, or after, or a part payment of an overdue debt,

is not a good consideration for a contract to forbear to sue.

The cases relied on by the defendant do not apply to a loan or obligation for the payment of money. Where the time in a contract for the delivery and purchase of goods, before breach, is extended, the mutual promises to deliver and accept and pay, are sufficient consideration for a new contract: *Carrier v. Dilworth*, 9 P. F. Smith, 406; *McNish v. Reynolds et al.*, 28 PITTSBURGH LEGAL JOURNAL, 343. So, where there is a lease by the year and before the end of the year, the lessor and lessee agree to change the time of payment of the rent from the beginning to the end of the month for the next year, the new agreement is valid: *Wilgus v. Whitehead*, 8 Norris, 131. In these and similar cases the change involves some advantage to one party or disadvantage to the other; and often, if such new agreement were void, one party could mislead the other into a breach of his contract greatly to his injury.

We are of opinion that defendant's affidavits set out no legal defense and are insufficient.

The record is remitted with directions to the court below to enter judgment against the defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the court why such judgment should not be entered.

For plaintiffs in error and below, *Messrs. Barton & Son and J. M. Hunter.*

Contra, Messrs. W. D. Patton and J. P. Colter.

DANIEL GARRISON, Defendant Below, v. DAVID H. PAUL.

A defendant's right to set-off must be perfect at the time suit is instituted against him. There is no doctrine of equitable set-off which dispenses with this rule.

Error to the Court of Common Pleas of Greene county.

David H. Paul and Daniel Garrison, having had a variety of business transactions together, agreed in writing to submit all matters in variance between them to arbitrators. The arbitrators awarded in favor of Paul the sum of \$612.25. Upon this award Paul brought the present action. During the trial in the court below Garrison offered to prove that subsequent to the bringing of the action judgment had been entered upon a judgment note against one Jesse Steel, David H. Paul and himself; that Jesse Steel was the principal debtor upon the note and Paul and himself were his sureties; that execution was issued, his goods sold, and the judgment with costs was paid in full, and that both Steel and Paul were insolvent. This offer

was refused by the court, and the refusal was assigned as error.

The plaintiff in error maintained that there was a distinction observed between a claim purchased after suit brought, for the purpose of defeating an action, and a liability incurred, though not suable before suit brought, and that in the latter case equitable relief would be exercised.

For plaintiff in error, *Messrs. Garrison and Knox*.

Contra, C. A. Black, Esq.

PER CURIAM. Filed November 25, 1881.

It is certainly well settled law that a defendant's right to a set-off must be perfect at the time the suit is instituted. We know of no doctrine of equitable set-off which dispenses with this rule. A surety has an action against his principal before being actually compelled to pay the money, because he could file a bill in equity for indemnity. But there can be no action for contribution between co-sureties, either at law or in equity, until the surety is obliged to pay the debt.

Judgment affirmed.

JOHN A. HERMAN, Defendant Below, v. THE CITY OF ALLEGHENY.

Where the agent of a vendor by public sale testified that he went to the purchaser and told him that he had come to tender him the deed, that he had it with him and the bond and mortgage, and that the vendor would like to have him arrange the bond and mortgage and take up his deed, and that the purchaser replied that he had not the money, he could not do it; *held*, that there was sufficient evidence from which a jury might find that there was a valid tender.

Where a purchaser is not absolutely bound it is not necessary that notice should be given him of the *exact time and place of resale*; but it is necessary that he should be notified that the property will be resold and that advertisement should be made thereof, and the sale should be on the same general terms as the first sale.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action of assumpsit brought by the city of Allegheny against John H. Herman to recover damages for the refusal of Herman to take and pay for two lots, purchased by him at a public sale of lots by the City. During the progress of the trial a witness on the part of plaintiff below testified as follows:

"Q.—Did you see Mr. Herman again about that?"

"A.—Yes, sir; I went and saw him according to the directions of the committee and yourself and tendered him a deed, took the deed and bond and mortgage with me."

"Q.—When did you see him and make a tender of that deed?"

"A.—I can't recollect the date, but it was sometime during the next year, 1874, I think, and I went to him, saw him at his store, told him we were anxious to have this thing fixed up and that I had come with the deed and bond and mortgage and would like him to take the mortgage and bond and execute it and pay his quarter down and leave his deed; Mr. Herman told me he

couldn't do it, he hadn't the money or something of that kind, he didn't say he wouldn't do it or didn't say he would do it."

The defendant below requested the court to charge: That there was no evidence of a sufficient tender of a deed to hold the defendant. This was refused.

That to entitle the plaintiff to recover it must show that a notice was given to defendant of the time and place of resale of the said lots; that said lots were advertised and public notice given that they would be resold.

In answering this point the court said: "It is not necessary that a notice should be given to the defendant of the exact time and place of resale; but it is necessary that notice should be given to the defendant that the lots would be resold and that advertisement should be made thereof, and the sale should be made upon the same general terms as the first sale."

To the answers of the court to these two points the defendant below excepted, and the jury having found for the plaintiff the defendant took a writ of error, assigning as error the answers above reported.

For plaintiff in error, defendant below, *J. Erastus McKelvey, Esq.*

Contra, W. B. Rodgers, Esq.

PER CURIAM. Filed October 17, 1881.

There was evidence that the witness had the deed with him when he went to make the tender, and the plaintiff was so told. He did not demand to see the deed, but refused to pay the money. We think it was ample to leave to the jury. It did not appear what were the conditions of the sale, or that it was expressly stipulated that upon non-compliance the property was to be resold at the risk of the purchaser. In such a case, where he is absolutely bound for the difference, there would be reason to hold that he must have notice of the exact time and place of the resale. But in the case before us the charge of the court went as far as the defendant below had any right to ask.

Judgment affirmed.

Court of Common Pleas, No. 2.

ABRAHAM WEILER v. The PENNSYLVANIA RAILROAD CO., JOSEPH AUSTEN et al.

A corporation is not liable in an action of trespass *vi et armis* for the act of its servants in the absence of evidence that the particular injury or act of trespass was done by its command or with its assent.

The depot and grounds of a railroad company are not public property like a road or street. They have a *quasi* public character resulting from the license of the company as common carriers, but that license only extends to their reasonable use for the accommodation

of passengers in going to and returning from trains, and necessary privileges connected with their business. There is no obligation on a railroad company to permit persons not having business with it as a carrier to come upon or remain at its stations; and especially no obligation to permit its buildings and grounds to be used by persons aiding in a competing or hostile business for plying such vocations.

On the other hand such company has duties to perform to the travelling public. Railroad officers and employees are conservators of the peace in and about their depots and tracks and on their trains. It is their duty to maintain order, decorum and decency therein, and to see that the accommodations provided for the passengers are not usurped by other persons for whom they are not intended.

Officers in charge of a depot, when they find a person there without ostensible business, apparently loitering, or one whom they have reason to suspect of being there on improper business, have a right to inquire as to his business. If he refuse to disclose it they have a right to order him to leave, and on his neglect or refusal to go, to remove him, using such force as may be reasonably necessary to that end.

For any excess of force beyond what is necessary in making such removal, the officers are liable to respond in damages.

If a person wrongfully at a railroad depot, after being warned to leave, refuse to do so and forcibly resist the police officers in their attempt to remove him, so as to become guilty of a breach of the peace, he may then be arrested without warrant, and the officers will only be liable for any excess of force used in making the arrest.

A police officer, a constable or sheriff or magistrate may make an arrest without warrant for a felony committed, or for a breach of the peace committed in his presence. If necessary in such case he may call to his aid the bystanders, and they are in law bound to respond.

Railroad policemen, commissioned under the provisions of the Act of Assembly of 27th February, 1865, P. L., 225, have in the performance of their duties all the powers of police officers of Philadelphia, which includes the power to arrest without a warrant for breaches of the peace committed in their presence.

In assessing damages, whether compensatory or punitive, the jury may take into consideration, in mitigation thereof, any conduct of the plaintiff plainly provocative of the acts done to him.

This was an action of trespass *vi et armis* against the Pennsylvania Railroad Company and certain of its employees to recover damages for an alleged assault and battery committed upon the plaintiff, and for his subsequent alleged unlawful arrest and imprisonment. Two of the defendants, Austen and Quirk, were police officers, commissioned by the Governor under the provisions of the Act of Assembly, approved the 27th day of February, 1865, but in the pay of the railroad company and entrusted by it with the care of its Union Depot in Pittsburgh. The facts appearing in evidence are clearly and succinctly stated in the charge of the court.

It was contended by counsel for the defendants that the defendant corporation could not, under the circumstances, be held liable in this

form of action; and that upon the conceded fact, that the plaintiff had refused to disclose his business at the depot to the officer when asked as to it, and to leave the premises when requested to do so, the officers were justified in removing him, using no more force than was reasonably necessary to that end.

Counsel for plaintiff, on the other hand, contended that as the act of the officers was within the line of their duty, the corporation was liable in the same form of action in which they were. They also contended that the Union Depot was a public place from which the defendants were powerless to exclude any person acting in a decent and orderly manner, whether there on business or not.

Numerous points were presented to and answered by the court, but the *gist* of them is embodied in the foregoing statement as to the claims of the respective parties, and in the charge of the court following:

For plaintiff, *Messrs. A. M. Brown and Josiah Cohen.*

Contra, Messrs. Hampton & Dalzell.

ABSTRACT OF CHARGE TO THE JURY BY EWING, P. J.

In the opening of the case you were sworn to try the issue as against the Messrs. Austen, Quirk, Beltzhoover and Watt and the Pennsylvania Railroad Company. At the close of plaintiff's testimony, on motion of defendants' counsel, a compulsory nonsuit was entered as to the action against Thomas E. Watt, there being no evidence to hold him in any form of action.

In answer to points of counsel we have instructed you that there can be no recovery against the Pennsylvania Railroad Company in the present form of action. This leaves for your consideration the case as against Messrs. Quirk, Austen and Beltzhoover. Your verdict may be against all of these defendants or against one or more of them and in favor of the others.

The action of plaintiff is a civil suit to recover damages for an alleged assault and battery and accompanying injuries. Most of the facts bearing on the case are either admitted or fully established by uncontradicted testimony on both sides.

It appears that on the morning of October 10, 1881, the plaintiff was at the Union Depot. He says, waiting to meet a friend expected on a train which he was informed was behind time. He had been through the depot to the front grate, was in the restaurant, then at other parts of the depot and passage way, and after a time he went to the front platform, near the main entrance to the depot building, where he stood

smoking for a short time, when Mr. Austen, one of defendants, approached him and requested to know his business. The plaintiff refused to make known his business, and refused when again requested. Plaintiff says that Austen then threatened to arrest him if he did not make known his business, and he denied the right and defied the officer to arrest him without showing his warrant or authority. Defendants Austen and Quirk say that plaintiff was not at that time threatened with arrest, but was told that if he would not make known his business he must leave the grounds of the company, and that if he did not go they would put him off. In this they are corroborated by Mr. Sproul and other witnesses who claim to have been present. Mr. Weiler did not leave, and the officers took hold of him, whereupon he resisted with violence, accompanied by language more forcible than polite, and a serious disturbance arose, attracting of course a crowd. The resistance was such that the officers were thrown to the ground twice, and it appears that some one called out that Weiler had a knife, and a small knife it appears was taken from his hand. It is perhaps doubtful as to whether or not he intended to use it or had it casually in his hand as he says. At this point the officers claim they first announced or intended an arrest, and that it was for the disturbance he had created. The "nippers" were put upon his wrists and he was taken to the lock-up on Diamond street. An information was made against him for "disorderly conduct," and after a hearing he was discharged by the mayor.

The plaintiff admits that some years ago he had been prosecuted, at the instance of the officers, indicted and plead guilty to illegal selling of railroad tickets. That at the time of this difficulty his business was selling railroad tickets as a broker, and also he says for the Pittsburgh and Lake Erie Railroad. He was known as a ticket broker, or, in the common parlance, as a "scalper." And it is evident that he knew he was so considered by the employees of the Pennsylvania Railroad Company. He says he knew who Mr. Austen was before the time of the difficulty. Austen says he knew Weiler by reputation before, but not by sight, until he was identified in the depot that morning by Mr. Watt.

Under an Act of Assembly, passed in 1865, the defendants Austen and Quirk had been duly commissioned by the Governor as railroad police officers, to have special powers in and about the depots, cars, trucks and grounds of the Pennsylvania Railroad Company. The act gives them, in the performance of their duties, the powers of police officers of Philadelphia,

which includes the power to arrest without a warrant for breaches of the peace committed in their presence.

These officers were usually stationed at the Union Depot. Their duties were as testified to, *inter alia*, "to keep thieves, disorderly persons, scalpers and loafers off the company's property."

It is conceded that the depot and grounds, where the difficulty arose and also where the defendants says the arrest as such was made and declared, are the private property of the railroad company. Such property is not public property to the extent that a road or street is public. It has a *quasi* public character by the license of the company as common carriers of passengers, but that license only extends to its reasonable use for the accommodation of its passengers in going to and returning from trains and necessary privileges connected with the business. They are not bound to permit persons not having business with them as carriers to come upon or remain at their stations. And especially they are not bound to permit their buildings and grounds to be used by persons aiding in a competing or hostile business for plying such vocations, no more than would one of you be bound to permit a competitor to use your store room for the circulation of his cards or making bargains with your customers. A railroad company not only has such rights in regard to its depot property, but it *has duties to perform towards the traveling public*. Railroad officers and employees are conservators of the peace in and about their depots and tracks and on their trains. It is their duty to maintain order, decorum and decency therein, and to see that the accommodations provided for passengers are not usurped by other persons for whom they are not intended.

A passenger depot is no place for "loafers" or loungers, whether they be drunk or sober, honest or dishonest, well dressed or shabby dressed. It is not a place for drunken men, nor for munching peanuts, squirting tobacco juice or puffing cigar smoke, or ogling lady passengers by any persons; much less by those who have no legitimate business there. If railroad authorities would pay stricter attention to their duties in this respect, they would in many cases greatly add to the comfort of the traveling public.

The officers are in the line of their duty where they strictly enforce the rules excluding people who have no legitimate business at the depots. Officers in charge should act discreetly and in a gentlemanly manner, careful not to give unnecessary offense. Where they find a

man at the depot without ostensible business, apparently looting, or one whom they have reason to suspect of being there on improper business, they have a right to inquire as to his business. And such person entirely misapprehends his rights when he resents such an inquiry as an insult. A gentleman having business would be unlikely to take offense at such an inquiry if put in a proper manner. A reply that he was waiting for a friend expected on a train would be very easy to make.

The plaintiff was engaged in a business in competition with the Pennsylvania Railroad Company. He knew that he was so known to the company's officers and that he was suspected of doing an illegal business. The defendants' testimony is to the effect that he had repeatedly been at the depot circulating his business cards. But even though he had, on previous occasions, been there selling his tickets contrary to law, that would not justify his ejection on this occasion if he were there on proper business—to meet a friend expected on a train would be such business.

It would be, however, a good reason for the defendants whose duty it was to keep such persons from the premises to demand of him his business, and it was an especially potent reason why the plaintiff should have told his business, if he had a legitimate business, as he says he had that morning.

The circumstances admitted fully justified the officers in demanding to know plaintiff's business, and to require him to inform them of it. When he refused to disclose his business it did not, however, authorize his arrest and taking to the lock-up, as at that time he had not committed a breach of the peace; but it did justify them in ordering him to leave, and if he either refused or neglected to go, they then had a right to lay hold of him and remove him by force, using, however, only such force as was reasonably necessary to remove him; and if he resisted violently they were justifiable in adding the reasonable force necessary to overcome that resistance; if injury resulted to the plaintiff therefrom he has no right to complain. If they used more force than was reasonably necessary under the circumstances, they are liable for any injury caused to the plaintiff by this excess.

Here comes another important question: I have already said that the mere refusal to state his business at the depot did not justify his arrest and carrying off to the lock-up. Neither did his refusal to go, alone justify anything more than the forcibly removing him. But if after being warned to leave and refusing to do

so, he forcibly resisted the attempt to remove him, violently resisted and struck the officers and was noisy and abusive, he then and thereby became guilty of a breach of the peace, for which he was liable to arrest by the officers. They would then have a right to arrest him and carry him to the lock-up (without a warrant), using such force and appliances as were reasonably necessary under the circumstances to accomplish the purpose, and in that case they would only be responsible for injury caused by excessive force used.

Ordinarily a warrant is necessary to authorize the arrest of any person. But it is not always necessary. A police officer, a constable or sheriff or magistrate may make an arrest without warrant for a felony committed, or for a breach of the peace committed in his presence. Not only is it his right but frequently it is his duty to make such arrest promptly, and if necessary to call to his aid the bystanders, and on such call they are in law bound to come to his assistance.

If the defendant, Beltzhoover, was a party to the whole proceeding, he is liable if the other defendants are liable. If he merely came to the assistance of the officers when called on to aid them in an arrest for what appeared to be a gross breach of the peace in the depot grounds, and he responded to the call and did nothing more than give what appeared to be reasonable aid, he is not responsible for any excessive force used by the other defendants.

If you find for the plaintiff, your next question is as to the measure of damages. It is first compensation (explains the elements of compensatory damages) for loss of time, expenses, pain suffered, etc. * * * And next, punitive damages, if you are of the opinion that the defendants acted maliciously or wantonly or in gross disregard of plaintiff's rights. If you pass beyond compensation and assess punitive damages, it must be based on the conduct of that one of the defendants who is least guilty and against whom you find a verdict. We do not say that it is or is not a case for punitive damages.

In passing on the question of punitive damages, you should take into consideration all the circumstances of the case. And even as to compensatory damages, you can take into consideration in mitigation thereof any conduct of the plaintiff plainly provocative of the acts done to him.

Taking your law from the court and your evidence from the witnesses, you will not allow either public clamor or prejudice on one side or sympathy on the other, or all these on either side to affect your verdict.

Verdict for defendants.

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PITTSBURGH, PA., MAY 10, 1882.

Supreme Court, Penn'a.

HANNAH ALLEN, Respondent Below, v. WM. ALLEN.

HANNAH ALLEN'S APPEAL.

Fraud which would vitiate a contract to marry will not have that effect when the marriage has actually been solemnized and consummated.

Pregnancy, at the time of marriage by another man than the husband, is sufficient ground for a divorce, provided it be not known to him.

The competency of witnesses to give expert testimony is a matter very much in the sound discretion of the trial court, and unless the discretion has been grossly abused, this court will not reverse for the admission of such testimony.

Appeal from the decree of the Court of Common Pleas of Fayette county.

Opinion by SHARSWOOD, C. J. Filed January 2, 1882.

By the first Section of the Act of May 8, 1854, P. L., 644, it is provided that "it shall be lawful for the Courts of Common Pleas of this Commonwealth to grant divorce where the alleged marriage was procured by fraud, force or coercion." By this language must of course be understood such fraud as would at common law render a marriage void. It is settled beyond all controversy that fraud which would vitiate any other contract—even an executory contract to marry—will not have that effect when the marriage has actually been solemnized and consummated. "It is well understood," says Chancellor KENT, "that error and even disingenuous representations, in respect to the qualities of one of the contracting parties in his condition, rank, fortune, manners and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced:" 2 Kent's Com., p. 77. It assumes that the party on entering into so solemn a contract, involving the most important duties and responsibilities for life and upon which his happiness so much depends, has made all proper inquiries or is willing to take the other party upon trust without inquiry. According to the form of the marriage service of the church of England each party takes the other "for better, for worse, for richer,

for poorer, in sickness and in health, to love and to cherish till death them do part, according to God's holy ordinance." The fraud must be in what has been sometimes termed the *essentia* of the contract. False personation by one of another person would undoubtedly be such a case. As to any other it will be found difficult after looking through all the authorities to lay down any rule which can sharply define and distinguish what are and what are not essentials. Every case must to some extent depend on its own circumstances. Thus it is well settled that want of chastity on the part of the woman—ante-nuptial incontinence—even though she may have expressly represented herself as virtuous, forms no ground for avoiding the contract. Mr. Bishop, who has studied the subject with great care and research in his valuable treatise on Marriage and Divorce, Section 179, considers that on well established principles if the woman has even been a common prostitute, and has reformed her life, yet conceals her former misconduct, the marriage would be still be good. The marriage contract is an express renunciation by her of all unlawful intercourse with others than her husband and he makes a similar renunciation. According to the marriage service before referred to they both solemnly promise, "forsaking all others," to keep themselves solely to each other. I consider this marriage service a good evidence of the ancient common law of England. This seems to be also the dictate of humanity and in conformity to the gospel which so strongly throughout inculcates the rule of mutual forgiveness. For otherwise, one of stronger passions, led astray by them or seduced by the wicked arts of others could have no hope from reform. In such cases it is best for society that the past should be entirely buried in oblivion and that the poor erring creature should have the chance of a new life of respectability and honor. It is best that the other party should know, when the sin is afterwards revealed to him, that it can do no good but unmixed evil to make it public by applying for a divorce. They must learn to submit to the inevitable. In this country—certainly in this State—adultery is a ground for divorce, a *vinculo matrimonii*, so that if there should be a relapse after marriage, the marriage can be annulled. The only practical result, therefore, of declaring the marriage absolutely void *ab initio* for simple ante-nuptial incontinence, whether in one instance or many, would be to render innocent children illegitimate. And if ante-nuptial incontinence be a sufficient ground of nullity as against the woman it is not easy to see why it

should not be so likewise against the man, and the consequences of such a doctrine it is not difficult to predict.

Actual pregnancy at the time of the marriage presents an entirely different question. It introduces a different element. The marriage status of the parties is changed. The man is then necessarily put to the alternative of either publishing his wife's shame or submitting to have the child of a stranger, an alien to his blood introduced, recognized and educated as his own legitimate offspring. If a man indeed marries a woman, knowing her to be pregnant, even though he may not believe that he is the father, he cannot set up the fraud, if afterwards discovered, for no man would do such a thing unless conscious of having had himself previous connection with her, and though she may have falsely assured him that the child was his, if he chooses to rely on that assurance, he must bear it as a misfortune. In one very strong case, where the parties being white, the child born after the marriage proved to be a mulatto, yet the woman simply concealed from the man the fact of having received a negro's embraces about the time she did his, the marriage was adjudged valid: *Scroggins v. Scroggins*, 3 Dev., 535. In support of these general views it will be sufficient to refer besides to *Reynolds v. Reynolds*, 3 Allen, 605; *Leavitt v. Leavitt*, 13 Mich., 452; *Hedden v. Hedden*, 6 C. E. Green, 61; *Farr v. Farr*, 2 McArthur, 35; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass., 330; *Baker v. Baker*, 13 Cal., 87, and our own case of *Hoffman v. Hoffman*, 6 Casey, 417. "There is no absolute rule," says Mr. Bishop, Section 180, "that pregnancy will entitle him (the husband), on discovering the fact, to have the marriage declared void. In some circumstances it will, in others it will not; depending on the extent and nature of the fraud in the particular instance, as appearing in the facts special to the individual case."

Applying these principles to the facts of this case, we think that under the evidence it was submitted to the jury with proper instructions. There was no sufficient evidence that the libellant had ever had sexual intercourse with the respondent before marriage. He positively denied it. The respondent indeed swore that it was his child. She admitted that she had said that it was the child of Samuel Williams, but that it was at Allen's request upon a promise that if she would he would live with her. This again he utterly denied. It was a strange story but the jury were the judges of the credibility of the witnesses. The child was born about seven months after the marriage, so there could

have been nothing in her appearance at that time to indicate her condition. It was certainly not necessary that she should have expressly denied her pregnancy before the marriage. No man would think of asking such a question of a woman he was about to make his wife. It would be regarded by her as insult, if she was as he then must have supposed a virtuous woman. Upon the question of whether Mrs. Johnson was an expert, it was very much in the sound discretion of the court, and we never reverse in such cases unless the discretion has been grossly abused, which it certainly was not in this instance.

Decree affirmed and appeal dismissed at the costs of the appellant.

For appellant, respondent below, *Hon. T. B. Seawright and Edward Campbell, Esq.*

Contra, Messrs. Boyle & Mestrezat and W. H. Playford, Esq.

THE LYCOMING FIRE INSURANCE CO., Defendant Below, v. STORRS, Assignee.

A writ of error will not lie to the refusal of the court below to set aside the service of a writ.

When a defendant appears *de bene esse*, and the court refuses to set aside the service of the writ, the defendant has only two courses, either to come in and defend or to stay out and take the risk of the service.

If he takes the steps of a defense, appears before arbitrators, agrees to continuances and substitution of arbitrators and appeals, he thereby cures defect of service, and waives the protests previously filed.

Where the assured fails to pay an assessment, of which he had received notice more than thirty days before the fire, as required by the terms of the policy, he or his assignee cannot recover; and this, although he had assigned for creditors, and the company's agent had agreed that the policy should be paid to the assignee in case of loss, and no notice of the assessment had been given to such assignee.

It is error to admit a policy of insurance in evidence without the application where the latter forms a part of it.

Error to the Court of Common Pleas of Bradford county.

The action below was by William R. Storrs, assignee of John F. Means, against the Lycoming Fire Insurance Company.

The following are the second and sixth assignments of error referred to in the opinion:

2. Because the court erred in their answer to defendant's second point, which is as follows, viz: "That according to the evidence of John F. Means, the real plaintiff, he received notice of the assessment more than thirty days prior to the fire which destroyed the property mentioned and described in the policy, as per notice given in evidence, that he, the said John F. Means, did not pay said assessment No. 35, as

required by the terms of the eighth condition of the policy, and of the notice to pay the same which was served upon him."

Answer of the court: "The facts here stated are undisputed, and if they were the only facts in the case relating to notice and payment of assessment No. 35, the plaintiff could not recover. The case is, however, being tried in the name of Storrs, assignee of Means, against the defendant. Refused."

6. Because the court erred in charging the jury as follows, viz: "Now, if you find from all the evidence in the case that Bartlett was the agent of the company, with power to write policies, that immediately after the assignment to Storrs he agreed to write on this policy that Storrs was the assignee of Means for the benefit of creditors, and that, in case of loss, the insurance was to be paid to Storrs; and if you further find that he did not give him notice of assessment No. 35, we think the plaintiff is entitled to recover. Because we think that, under his power to write policies, he could write upon the face of this policy what Judge RUSSELL testified he agreed to write upon it, and we think also that he had the power under his agency to agree to give this notice to Storrs."

The verdict and judgment were for plaintiff.

For plaintiff in error, defendant below, *Messrs. Williams & Angle and H. W. Watson.*

Contra, Messrs. D. A. Overton, Davies & Carnochan and R. A. Mercur.

Opinion by PAXSON, J. Filed May 2, 1881.

The defendant below has taken two writs of error in this case. The first was to the refusal of the court to set aside the service of the writ. The second was to the final judgment. It is plain the first writ was premature: *Coleman's Appeal*, 25 P. F. Smith, 441. This writ must be quashed; as the same point is raised by the first assignment of error, upon the second writ, the defendant will have the full benefit of it for all it is worth.

We need not discuss the question whether the service of the summons upon W. G. Tracey, the local agent, bound the company defendant. The latter appeared *de bene esse*, and subsequently moved to set aside the service. This the court refused to do. At this point the defendant was not in court unless the writ had been properly served. It had then but one of two courses to pursue. The one was to come in and defend the suit, and the other was to stay out and take the risk of the service. It attempted to do both, and as might have been anticipated did not succeed. The plaintiff took out a rule of reference. The defendant appeared

before the arbitrators, agreed to a continuance, and also agreed to a substitution of another arbitrator in place of the one first chosen, contested the cause before the arbitrators, and then appealed from their award. The defendant's appearance before the arbitrators, and its subsequent appeal, were equal to service: *Evans v. Duncan*, 4 Watts, 24. And its agreement to continue and to substitute an arbitrator was a waiver of the protests previously filed. We see no error in the first assignment.

2. The second assignment is sustained. The defendant's second point should have been affirmed. The facts were not disputed that John F. Means, the assured, received notice of the assessment more than thirty days prior to the fire which destroyed the property insured, and that the said Means did not pay his assessment No. 35, as required by his policy, and the notice served upon him to do so. The learned judge, while admitting the facts as above stated, declined the point, for the reason that the case was being tried in the name of Storrs, assignee of Means, against the defendant. This was error. Storrs was a voluntary assignee for creditors. The company had nothing to do with him. He held no policy, nor had he any contract relation with the company. Means still had the beneficial interest in the policy. If paid, the proceeds would go to him or to the payment of his debts, which is the same thing. Hence, it is entirely immaterial whether the agent Bartlett made the agreement referred to in the sixth assignment or not. Granted that it was made, and by competent authority, and that the company failed to give notice of the assessment, what does it matter? Can the assignee complain? Certainly not. He was not insured, and had no interest. Can Means complain? His mouth is closed, because he had notice and did not pay the assessment. Nor does it help him that he supposed his assessment had been paid to the company by Bartlett, the agent. He had not paid Bartlett, and any agreement between them that Bartlett should credit the premium on a debt he owed Means on a land contract would not avail as against the company. Bartlett had no right to take the company's money to pay his private debt to Means, and this the latter knew or ought to have known. The second, third, fourth, sixth, seventh and eighth assignments are substantially covered by the foregoing remarks, and are sustained.

5. This assignment is ruled by *The Lycoming Mutual Insurance Co. v. Sailer*, 17 P. F. Smith, 108, where it is held that it is error to admit the policy in evidence without the application

where the latter forms a part of it. In that case the defect was cured by the defendant putting in evidence the application. Such was not the case here. The defendant produced the application in court, and tendered it to the plaintiff, who refused to offer it. The court admitted the policy without the application, which was error.

9. The deed from Storrs, assignee, to Means, reconveying the assigned property, was competent evidence to show that Means was the real party in interest. This already appeared. The evidence was cumulative, and not very important. Yet I see no good reason why it should not have been received.

The first writ of error is quashed.

The judgment is reversed upon the second writ, and a venire facias de novo awarded.

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**THE PENN MUTUAL AID SOCIETY, Defendant
Below, v. CORLEY.**

A *narr.* in assumpsit will not support an action on a policy of life insurance under seal.

A general objection to evidence will enable the excepting party afterwards to assign any cause of objection to the evidence. If the proponent wishes the grounds of objection to be specified, he must call upon the exceptant to state them at the trial, and have them incorporated in the bill of exceptions.

Where the assurer agrees to pay the sum assured "upon the death" of a party, no notice of the death to the assurers need be given before suit brought.

Where a policy makes the application a part of the contract, it is error to admit the policy in evidence without producing or accounting for the application.

Error to the Court of Common Pleas, No. 4, of Philadelphia county.

This was an action on a life policy, which provided that the society would pay the plaintiff \$2,000 "upon the death of Patrick Corley." It also provided that the application should constitute a part of the contract. The declaration was in assumpsit, but the policy was under seal. Upon the trial the plaintiff offered the policy in evidence, and the defendant objected. The policy was admitted and an exception sealed. Plaintiff then proved the death of Patrick Corley and rested.

The court instructed the jury to find for the plaintiff, if they believed the evidence.

For plaintiff in error, defendant below, *Messrs. Sharp & Alleman.*

1. The policy should not have been admitted.

(a) Because it was not accompanied with the application: *Lycoming Fire Insurance Co. v. Storrs*, 29 PITTSBURGH LEGAL JOURNAL, 352; *Farmers' Insurance Co. v. Meckes*, 38 *Legal Intelligencer*, 317.

(b) Because the *narr.* was in assumpsit and the policy was under seal: *Shaeffer v. Geisen-*

beyer, 11 Wright, 500; *McManus v. Cassidy*, 16 P. F. Smith, 260.

2. No proof was offered that the company had been notified, before suit brought, of the death of Patrick Corley.

When a promise to pay money is contingent upon the happening of an event, which must of necessity be peculiarly within the knowledge of the promisee, notice of the happening of the event must be given the promisor before an action can be maintained: *Parsons on Contract*, Vol. II, pp. 669, 670; *Vyse v. Wakefield*, 6 M. & W., 442; 8 Dowl. P. C. 377, 4 Jur. 509; Affirmed on Error, 7 M. & W., 126; *Bouvier's Dictionary*, Edition 1864, Title; "Notice," 241, first column, Par. (4) (5); see *Taylor v. Whitman's Administrators*, 3 Gr., 138, 139.

Contra, *Theodore F. Jenkins, Esq.*

1. No reason was assigned for the objection to the policy. The assignment of error is therefore bad.

2. As the defendant appeared, it did not matter whether the summons was in debt or case; the *narr.* was in debt and pleas either responsive or bad. *Non assumpsit* was a bad plea and a nullity. The society's good pleas, then, were affirmative and the burden was on them.

Opinion by STERRETT, J. Filed February 20, 1882.

The declaration in this case is somewhat peculiar. It has some of the distinctive features of a *narr.* in case, but it is devoid of essential characteristics of both debt and covenant. After reciting that the company, by an instrument of writing under seal, called a certificate of membership, insured the life of plaintiff's husband to the extent of \$2,000 for her benefit, and promised under its seal to pay her that sum upon his death, and averring that he afterwards died, and thereupon the said sum became payable to her, etc., the declaration alleges the breach in the following words: "Yet the defendant, not regarding its said promise, has hitherto neglected and refused, and still does neglect and refuse, to pay the said plaintiff the sum of \$2,000, or any part thereof, although often requested by the plaintiff so to do, whereby the plaintiff has sustained damages to the amount of \$5,000, and therefore she brings suit," etc. If good for anything, this must be regarded as a declaration in assumpsit. The summons was in that form, and the action was so recognized in the pleas and on the trial, as appears by the bill of exceptions.

The certificate of membership recited in the declaration, unaccompanied by the application therefor, was received in evidence under a gen-

eral objection and exception. This is the subject of the first assignment of error, in support of which several distinct positions are taken. Inasmuch as the company was not called upon at the time to specify, it cannot be considered as having waived any ground of objection to the admission of the certificate that might then have been specifically urged.

It is contended, in the first place, that, in connection with and as part of the certificate, the plaintiff was bound to offer the application for membership, or give a satisfactory reason for not doing so.

The certificate provides that "if the proposals, answers, declarations and representations made by the aforesaid member in his application for membership, and which are hereby made a part of this certificate, as if fully herein recited, and upon the faith of which this agreement is made, shall be found in any respects untrue, then and in such case this certificate shall be null and void," etc. In view of this provision it was clearly incumbent on the plaintiff to present the application in connection with the certificate of which it forms a part, or account for its non-production. The reason of this has been so clearly pointed out in several cases, that it is unnecessary to add anything to what has been there said: *Lycoming Mutual Insurance Co. v. Sailer*, 17 P. F. Smith, 108; *Lycoming Fire Insurance Co. v. Storrs*, 29 PITTSBURGH LEGAL JOURNAL, 352; *Farmers' & Mechanics' Mutual Insurance Co. v. Meckes*, 38 *Legal Intelligencer*, 317. There is nothing upon the record in this case to excuse the non-production of the application.

It is also contended that the admission of the contract or certificate of membership under the corporate seal of the company was precluded by the form of action adopted. We think this position is also well taken. Where, as in this case, the cause of action arises upon a specialty or writing under seal, it is well settled that the action must be debt or covenant as the case may be: *McManus v. Cassidy*, 16 P. F. Smith, 260, and cases there cited. While the Legislature, by statutes of amendment, and the courts, by judicial construction, have gone far to relieve against technical distinctions which sometimes interfere with the trial of causes on their merits, they have not yet obliterated the boundary lines between the different forms of actions as they are defined by the common law. If the contract on which the claim of the plaintiff below is based had been properly in evidence, the instruction complained of in the second assignment of error would have been unobjectionable. There is nothing in the nature of the

contract or in any of its provisions requiring either notice of death or demand before bringing suit.

The third assignment of error is destitute of merit. The jurors summoned to serve for the week preceding the trial were in attendance, and from them the jury was duly impaneled and sworn to try this case. In the absence of any evidence to the contrary, it must be presumed that they were in attendance by direction of the court.

Judgment reversed and venire facias de novo awarded.

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In Re Estate of JACOB HAYS, Deceased.

Appeal of JOHN K. HAYS and IVY SEWALT,
Devises.

The Statute of Limitations does not apply to expenses of administration.

Appeal from the decree of the Orphans' Court of Allegheny county.

On November 19, 1879, E. W. Hays, executor of the last will, etc., of Jacob Hays, deceased, presented his petition to the Orphans' Court of Allegheny county, setting forth that he filed his first account at No. 67 March Term, 1867, and his final account at No. 12 June Term, 1879; that by the decree on this last account there was found to be due him \$1,588.66, that \$688.66 was for expenses paid out in the management of the estate, and \$900 his compensation as executor; that there was no personal property in his hands, that the testator by his will devised a certain farm in Mifflin township to his daughter, Ivy Sewalt, and his son, John K. Hays, and another farm in Butler county to other children mentioned in the petition, and directed that in case his personal property did not pay the debts of his estate, that the same should be charged on said real estate in the proportions of three-fourths on the farm in Mifflin township and one-fourth on the farm in Butler county, and praying that the land might be sold for the payment of the debt aforesaid, and that a citation should issue to John K. Hays and Ivy Sewalt, to show cause why the real estate in Mifflin township should not be sold for the payment of so much of said debt as should be justly chargeable thereon. A citation was awarded and John K. Hays made answer that the land in Mifflin township had been in possession of the devisees for thirteen years, and that the property had been freed from all charges by virtue of the statute of limitations—no proceeding having been commenced to obtain a lien or continue the lien made by the Act of Assembly for five years after death of deceased.

The court below made the following order: And now, * * * it is ordered, adjudged and decreed that a writ of *venditioni exponas* issue as respects land late of Jacob Hays, situate in the county of Allegheny, devised to John K. Hays, mentioned in said petition, for the sum of \$675, or being the three-fourths of the expenses of administration due Edward Hays, executor, and costs; sheriff's return to be made the first Monday of June, 1881.

From this decree John K. Hays and Ivy Sewalt appealed.

For appellants, *John R. Large, Esq.*

Contra, J. H. Baldwin, Esq.

PER CURIAM. Filed November 14, 1881.

There is nothing in this case which can distinguish it from *Cobaugh's Appeal*, 12 Harris, 143. Indeed the learned counsel for the appeal attacked the authority of that case, but the principle there settled is founded upon a just and reasonable construction of the acts limiting the lien of the debts of a decedent. There is, however, a clerical error in the decree of the court below, which ought to be corrected. The name of Ivy Sewalt, one of the appellants, was accidentally omitted.

Decree amended by inserting the name of Ivy Sewalt after the name John K. Hays, and so modified the decree is affirmed and appeal dismissed at the costs of the appellants.

JOSHUA M. DUSHANE et al., Administrators,
Defendants Below, v. THE NATIONAL BANK
OF FAYETTE COUNTY.

Usurious interest actually received by a national bank in the renewal of a series of notes cannot be set-off in a suit brought by the bank on the last renewal note in the series.

Error to the Court of Common Pleas of Fayette county.

Opinion by GORDON, J. Filed November 25, 1881.

When this case was here last year (*National Bank of Fayette County v. Dushane et al.*, 9 W. N. C., 472), we reversed the case on the affirmation, by the court below, of the following point: "If the jury find from the evidence that the plaintiff has charged and received a rate of interest over six per cent. on the note in suit, and the several notes of which it is a renewal, the interest bearing quality of said notes is thereby destroyed, and no interest can be allowed; and the defendant is entitled to a credit against the face of the note of all payments made." Now we are asked to reverse the court below for refusing the following point and offer: "If they,

the jury, find that more than six per cent. interest was charged and taken by the plaintiff on the note in suit, and on the several notes of which it was the last renewal, the interest bearing quality of said notes was destroyed, and all payments on said notes, whether as interest or otherwise, must be deducted from the face of the note." Then comes the offer as follows: "Defendant offers to prove by this witness that the note in suit is the last of a series, the first of which was made on the 3d of March, 1870; that interest exceeding six per cent. was charged on all these notes, and paid at the time of the several renewals, for the purpose (1) of showing that a rate exceeding that allowed by law was charged by the bank, and that, therefore, the interest bearing quality of the note was destroyed, and the defendant is entitled to a credit as against the face of the note of all payments made. And if this should be refused (2) that the payments must be applied to the note, and renewals at the rate of six per cent. interest and the excess credited on the principal of the note."

As an inspection will show these embody not only the identical proposition, but substantially the identical language of the point found in the former case. This, then, is an attempt to procure at our hands a reversal of our own decision in this same case and on the very same facts. To a proposition such as this we cannot assent, and as we have before said, principally because the case of *Barnett v. The Bank*, 8 Otto, as we understand it, stands in the way. It may, indeed, be, as the counsel for the plaintiff in error thinks, that we have not properly interpreted that case, but for this we know of but one remedy and that is a review of the question in the Supreme Court of the United States.

Judgment affirmed.

For plaintiff in error, defendant below, *Messrs. Boyle & Mestrezal.*

Contra, N. Ewing, Esq.

THE OAKLAND RAILWAY COMPANY, Defendant Below, v. ELLEN THOMAS.

Where the court below instructs the jury that there is not sufficient evidence to warrant a finding upon a particular point, the Supreme Court will not review such action unless the *whole evidence is before it, properly certified.*

Error to the Court of Common Pleas, No. 2, of Allegheny county.

This was an action brought by Ellen Thomas to recover damages from the Oakland Railway Company for injuries sustained to her house by reason of the breaking loose of a loaded truck car of the company, which descended a steep grade and entered her dwelling. The defend-

ant below recovered a verdict for \$452.08. The real question intended for review was whether if the plaintiff below had received compensation for this injury from the city of Pittsburgh in an assessment for damages paid to her by the city for the grading of the street upon which the house was located, she would not be estopped from recovering in this action, and whether there was sufficient evidence to warrant a jury in finding that such damages had been included in the payment made by the city. Six specifications of error were filed, but five of them not setting forth the errors with the exactness required by the rules of the court, were not reviewed. The only error assigned, which was passed upon, appears in the opinion below.

For plaintiff in error, defendant below, *Messrs. J. W. Over and T. Mellon.*

Contra, Messrs. Thos. M. Marshall and Chas. F. McKenna.

Opinion by GORDON, J. Filed November 7, 1881.

The third assignment of error is the only one that we can take notice of, the others not having been assigned according to the rules of this court. That assignment reads as follows: "The court erred in taking the facts and evidence involved in the defendant's sixth and seventh points from the jury, and instructing them, that while the evidence of the defendant, if believed, would justify them in finding that the viewers in awarding damages against the city for the grading of the street on this property did assume that the injury to the house was caused wholly by the grading, and they awarded her what they believed to have been the full value of the house as it stood prior to the injury, and that she received the money on the award, yet the evidence fails to show that the plaintiff so made her claim or understood the damages were so assessed and paid."

This excepts to the court's instruction to the jury as to the want of evidence on part of the defendant to sustain a particular point of its defense to the claim of the plaintiff. The learned judge says there was no evidence on this point, and the counsel for the defendant says there was such evidence. But in order to settle this controversy we should have before us the evidence given in the court below; the whole of it, and that properly certified. Instead of this we have what the counsel for the defendant calls extracts from the testimony, and what the counsel for the plaintiff designates as no testimony at all. Under such a presentation of the case we can do nothing; the matter resolves itself into a mere question of verity between

the court and the counsel, the court having the advantage of a *prima facie* presumption in favor of its correctness, and the counsel unsupported by any legal evidence.

Under such circumstances nothing is left for us but to affirm the case.

Judgment affirmed.

District Court, United States.

Western District of Pennsylvania.

IN EQUITY.

J. W. CURRY et al., Assignees, etc. v. THOMAS McCAULEY et al.

1. In Pennsylvania a mortgage upon delivery becomes *eo instanti* effective; therefore, an assignee in bankruptcy cannot avoid a mortgage given by way of preference if it was delivered more than two months before the proceedings in bankruptcy against the mortgagor were commenced, although not recorded until within the two months.
2. It is the privilege of the creditor to avail himself of counter-securities given to and held by the surety, but the law does not force them upon him against his consent. If he is satisfied with his original security he may stand on it.
3. Where the surety takes a counter-security for his own indemnification and the creditor is not a party to the transaction and has not adopted the act of the surety, the creditor may prove in bankruptcy as an unsecured creditor, and such proof does not release or affect the individual liability of the surety to the creditor.
4. If it appears on the face of a bill in equity that the plaintiff has a plain, adequate and complete remedy at law, the objection, although not raised by the pleadings, being jurisdictional, cannot be overlooked by the court, and the bill will be dismissed.

Opinion by ACHESON, D. J. Filed April 22, 1882.

On or about May 1, 1874, William M. Lloyd, Thomas McCauley, Sylvester C. Baker and John Lloyd executed and delivered to Dr. Alexander Johnston their joint and several bond of that date in the penal sum of \$100,000, conditioned for the payment by the obligors to Dr. Johnston of \$50,000 on or before May 1, 1880, with interest payable semi-annually. Although the fact does not appear on the face of the bond, the evidence in this case shows that the consideration therefor was a debt of \$50,000 due from William M. Lloyd to Dr. Johnston. The latter died December 15, 1874. He bequeathed this bond to his daughter, Mrs. Jane Freed, to whom Dr. Johnston's executors assigned the bond, December 13, 1875.

After Dr. Johnston's death William M. Lloyd executed to said Thomas McCauley and Sylvester C. Baker a mortgage of certain real estate, dated and acknowledged May 8, 1875, and duly recorded September 17, 1875. This mortgage recites that McCauley and Baker are sureties for William M. Lloyd in said bond and that the

mortgage is given "as well to secure the parties of the second part [McCauley and Baker] and save them harmless against said suretyship, as in consideration of one dollar," etc. The defeasance clause reads: "Provided, etc., if the said William M. Lloyd, etc., shall and do well and truly pay the interest aforesaid on said bond to the said Alexander Johnston, his heirs, executors, etc., at the times therein stated, and the principal sum therein stated, and save the said parties of the second part harmless from the payment thereof as sureties as aforesaid, then," etc. It does not appear that Dr. Johnston ever solicited the giving of such mortgage; nor were his executors or Mrs. Freed in any manner connected with the giving of it. Their knowledge of it was acquired long afterwards. It was a transaction wholly between William M. Lloyd and his sureties.

On November 11, 1875, a creditor's petition in bankruptcy was filed against William M. Lloyd upon which he was subsequently adjudicated a bankrupt. Before the commencement of this suit Mrs. Freed as an unsecured creditor proved her debt upon said bond against the estate of the bankrupt, and since the bill was filed received a dividend of \$2,341.20.

John Lloyd on November 11, 1872, by permission of William M. Lloyd, without any express agreement as to payment of rent, took possession of the real estate covered by the subsequent mortgage to McCauley and Baker, and held possession until May 15, 1879.

The bill in this case is by the assignees in bankruptcy of William M. Lloyd against Thomas McCauley, Sylvester C. Baker and John Lloyd, Stephen Johnston and J. Lowry Johnston, executors of Dr. Alexander Johnston, deceased, Mrs. Jane Freed and the bankrupt. The bill charges that the said mortgage is a fraudulent and unlawful preference under the bankrupt law, and the first prayer is that it be decreed to be null and void.

The bill alleges that the mortgage bears a false date and was not signed and acknowledged on May 8, 1875, as it purports to have been, but was executed within the period of two months prior to the filing of the petition in bankruptcy; or if executed and delivered sooner, was kept from record until September 17, 1875, in pursuance of the fraudulent agreement and conspiracy between the parties to the mortgage. These allegations are all denied by the answers and the findings of the master upon the questions of fact are against the plaintiffs. He reports that the mortgage was executed and acknowledged the day of its date and delivered more than two months prior to the filing of the petition in

bankruptcy, and that there was no such fraudulent conspiracy or agreement as alleged. I have very carefully read and considered the evidence and have no difficulty in holding that the exceptions filed by the plaintiffs to this part of the master's report have no substantial basis. I think it is satisfactorily established that the mortgage was signed, acknowledged and delivered on May 8, 1875. Under the pleadings and evidence no other finding is allowable. If there was an agreement to keep the mortgage secret and withhold it from record, it would, it seems, be a matter of no importance: *Sawyer v. Turpin*, 91 U. S., 121. But I see no evidence to justify the conclusion that there was any such agreement or understanding.

The master, however, finds that at the date of the mortgage William M. Lloyd was insolvent and was known so to be by himself and Thomas McCauley, Sylvester C. Baker and John Lloyd, and that said mortgage was given and intended as a preference. It is contended, therefore, that the mortgage must be adjudged invalid under the bankrupt law because not recorded two months prior to the filing of the petition in bankruptcy. But it is the settled law of Pennsylvania that the recording of a mortgage of real estate is not essential to its validity. As between the parties upon delivery it becomes effective *eo instanti*. And an unrecorded mortgage is held to be good against an assignee for the benefit of creditors, the heirs of the mortgagor, and every one claiming under the mortgagor who had actual notice thereof before his rights attached: *Wolf v. Eichelberger*, 2 Pen. & Watts, 346; *Mellon's Appeal*, 32 Pa. St., 121, 129; *Britten's Appeal*, 45 Id., 178; *Spackman v. Ott*, 65 Id., 131; *Tryon v. Munson*, 77 Id., 250; *McLaughlin v. Ihmsen*, 85 Id., 364. Such being the law of the State, the mortgage here cannot be avoided by the assignees in bankruptcy for the cause assigned by them: *In re Wynne*, 4 B. R., 23; *Seaver v. Spink*, 8 Id., 218; *Gibson v. Warden*, 14 Wal., 248, 249; *Sawyer v. Turpin*, 91 U. S., 118, 119; *Stewart v. Platt*, 101 Id., 731; *Clark v. Iselin*, 21 Wal., 377; *In re Swenk*, 9 Fed. Rep., 643. To these might be added other authorities which the master cites.

Down to this point I think the master was entirely right; but I am constrained to dissent from his conclusion touching the effect of Mrs. Freed's proof of debt and acceptance of a dividend. The master being of opinion that the mortgage given to the bankrupt's sureties operated to make Mrs. Freed a secured creditor within the meaning of Section 5075, Rev. Sts., and that by proving her debt as an unsecured claim and receiving a dividend thereon, she had

released the mortgage security and thereby discharged the sureties from their personal liability upon said bond,—recommends a decree that the mortgage be satisfied of record and that Mrs. Freed be perpetually enjoined from suing Thomas McCauley, Sylvester C. Baker and John Lloyd upon said bond. The master adopted in their length and breadth the views advanced by Judge HALL *In re Jaycox & Green*, 8 B. R., 241, overlooking the caution given by that learned jurist himself at the close of his opinion that it discussed questions not necessary to be then decided. Regarding the actual ruling, that case is by no means an authority for a decree so disastrous to Mrs. Freed as the one proposed.

It is undoubtedly a well recognized principle that the creditor is equitably entitled to the benefit of all counter-securities taken by the surety for the payment of the debt or his own indemnification. Some of the authorities speak of a trust subsisting under such circumstances, others of a *quasi-trust*. The right itself, however, is a purely equitable one in favor of the creditor, of which he may avail himself if he will. But if he is not an actual party to the transaction and has in nowise assented to the taking of such securities, he is under no obligation to assume any responsibility in respect thereto and is not bound to resort to them. It is the creditor's privilege to avail himself of counter-securities given to and held by the surety, but the law does not force them upon him against his consent. If satisfied with his original security he may stand on it.

The original and primary object—indeed it would be more proper to say the sole object—of William M. Lloyd in giving the mortgage in question was to indemnify the parties who had executed the bond as joint obligors with him for his accommodation, and who, therefore, stood to him in the relation of sureties. As we have seen, the mortgage was executed nearly five months after Dr. Johnston's death, and neither his executors nor Mrs. Freed had any connection near or remote with the taking of it. Nor did they subsequently adopt the action of the sureties. Mrs. Freed, therefore, had no mortgage of the real estate of the bankrupt when she proved her debt: *Weed v. Nelson*, 9 Gray, 55, and she had the right to prove as she did, *Ibid.*: *Provident Institution, etc., v. Stetson*, 12 Gray, 27. That she was an unsecured creditor was expressly decided by my predecessor, the late Judge KETCHAM, in a contest which arose at an early stage of the bankruptcy proceedings upon the question whether there was a statutory quorum of petitioning creditors.

What other safe course was open to Mrs. Freed

than the one she pursued? The validity of this mortgage has been constantly denied by the assignees, and this bill charges it to be a fraudulent and void preference, and prays that it be so decreed. And even yet the assignees maintain that it is a worthless security to everybody.

By proving her debt in bankruptcy as an unsecured claim, Mrs. Freed may have waived her equitable right to seek the benefit of the mortgage security which the bankrupt's sureties hold, (*In re Jaycox & Green, supra*), but assuredly she did not release them from their personal liability as obligors in the bond to Dr. Alexander Johnston. Her course of action has in nowise hurt them and her rights against them remain unimpaired: *Merchants National Bank v. Comstock*, 11 B. R., 235. That case is directly in point, and the lucid opinion of Judge ALLEN (who there speaks for the whole Court of Appeals of New York) convincingly shows that the proposition that the personal liability of a surety is released by reason of proof in bankruptcy made in the manner and under such a state of facts as here, is fallacious. This mortgage, therefore, must stand for the indemnity of the bankrupt's sureties in accordance with the intention of the parties thereto.

One of the prayers of this bill is that John Lloyd account for the rents of the said real estate during the period of his occupancy. His possession was personal to himself and unconnected with the mortgage. The other defendants, therefore, had no interest whatever in the controversy touching his occupancy, and clearly the bill might have been demurred to for multifariousness. But this part of the bill is obnoxious to a more radical objection. The plaintiffs having a plain, adequate and complete remedy at law against John Lloyd if liable for the use and occupation of these premises, are not entitled to equitable relief. This objection being jurisdictional cannot be overlooked by the court although not raised by the pleadings: *Baker v. Biddle*, Bald. R., 394; *Hipp v. Babin*, 19 How, 278; *Parker v. Winnipiseogee Company*, 2 Black, 545; *Oetrichs v. Spain*, 15 Wal., 228. If, as has been suggested, the right of the assignees to bring an action at law is now barred by the two years' statutory limitation, it is unfortunate, but this is no justification for retaining a bill in a matter over which the court has no equitable cognizance.

Let a decree be drawn, dismissing the bill with costs to be paid out of the bankrupt's estate.

For complainants, Messrs. George Shiras, Jr., and George M. Reade.

For respondents, Messrs. S. S. Blair, Benj. L. Hewit, S. Schoyer, Jr., and West McMurray.

Court of Common Pleas, No. 1.

GEORGE E. PEEBLES v. THE CITY OF PITTSBURGH.

An illegal and void assessment for street improvements, paid under protest, cannot be recovered back in the absence of actual or threatened seizure of person or property. The mere fact of protest, at the time of payment, does not render such payment involuntary.

The decision in the case of *The Union Insurance Co. v. The City of Allegheny* followed.

This was an action brought to recover back assessments paid for the improvement of Penn avenue under the Penn Avenue Act.

The parties dispensed with a trial by jury and submitted the law and the facts to the court in accordance with the provisions of the Act of April 22, 1874. The case was heard before STOWE, P. J., who found that the installments sought to be recovered back were paid after notice from the city attorney, stating that unless payment was made immediately it would become his duty to collect the same by process of law, and that upon the payment of the installments the plaintiff declared that he paid under protest and gave notice that he was not legally liable to pay the same and would seek to recover them back.

The court further found that the city attorney assented to the proposition, that if there was no legal liability to pay the assessment the money could be recovered back from the City.

It also appeared from the plaintiff's affidavit of claim that he knew or believed that the assessment was illegal and void at the time the several amounts were paid.

For plaintiff, *Messrs. John Dalzell and W. P. Elliott.*

Contra, W. C. Moreland, Esq.

Opinion by STOWE, P. J.

The plaintiff's land being rural or country property, it is clear under the decision of *Seeley v. The City of Pittsburgh*, 82 Pa. St., 360, that the assessment against the plaintiff was illegal and void, and such as he could not have been compelled by action or legal process to pay. But there was no actual or threatened seizure of person or property at the time of payment, nor could there have been anything more than a *scire facias* issued to which the plaintiff could have made defense. The fact of payment under such circumstances does not make it involuntary to such an extent as will enable the plaintiff to recover back the money paid. The decision lately made in *The Union Insurance Co. v. The City of Allegheny* fully expresses our views upon this question.

It is now ordered and adjudged that judg-

ment be entered in favor of the defendant and against the plaintiff with costs of suit, unless exceptions are filed to the foregoing findings of fact or the said conclusion of law within thirty days from notice hereof.

BURNING OF THE ALLEGHENY COUNTY COURT-HOUSE.

The Law Library Saved.

The main building of the Court-House in this city was burned on Sunday last. The records of the Recorder's, Register's and Clerk of Courts' office were early removed and saved.

Between two and three thousand books in the law library was in imminent danger of destruction but were saved by the librarian, Master Percy G. Digby, who organized a force of volunteers and directed the removal of them to the Criminal Court room. His services deserve a substantial recognition by the library committee or the members of the Bar.

—*The American Law Magazine* is the title of a new monthly published in Chicago and edited by J. B. Martindale, Esq.

—We have received the first number of the *Alabama Law Journal*, a monthly published at Montgomery and edited by John S. Jemison, Esq.

—*The Southern Law Review* for April-May is a very valuable number. It has an article on "The rights of *bona fide* purchasers of underdue negotiable paper secured by mortgage," by Hon. George W. McCrary; on "The law for Play Wrights," by E. B. Callender; on "The Capture of Mason and Slidell," by Charles R. Grant, and on "Damages for Corporal Injuries to Minors," by J. M. Grant.

—Mills & Co., of Des Moines, Iowa, publishers of the *Western Jurist*, have commenced a monthly publication called *The Supreme Court Transcript*, containing all the decisions of the Supreme Court of Iowa. They also announce another publication called *The U. S. Supreme Court Reporter*, edited by Hon. Samuel T. Miller, Associate Justice of the Supreme Court. They promise that this series of reports will excel all others, in that they will contain "a much fuller and more complete statement of authorities cited, and points relied on, by counsel; more accurate and comprehensive head-notes or syllabus to each case; an ample and well arranged index; publication of the opinions immediately after their delivery." These publications are to be published as a supplement to the *Jurist*, and are furnished at \$1.50 and \$3.00 per volume respectively.

Pittsburgh Legal Journal.

ESTABLISHED 1853.

E. Y. BRECK, : : : : Editor.
 N. S., Vol. XII. }
 O. S., Vol. XXIX. } No. 40.

PITTSBURGH, PA., MAY 17, 1882.

THE PROPOSED CHANGE OF THE SITE OF THE NEW COURT-HOUSE.

Since the burning of the Court-House in this city, there has been a great deal written and said in reference to erecting the new one, if built, in the city of Allegheny. The advocates of this scheme have gone so far as to propose an offer of money aid, ground, etc. The legal aspect of the matter appears to have been entirely overlooked, but a brief reference to the existing laws and a constitutional prohibition will satisfy the most jealous citizen of the North Side that the County Commissioners are without power to change the county seat.

In the Act of the Executive Council of the Commonwealth, passed in 1785, laying out the "Reserve Tract opposite the town of Pittsburgh," there was a provision setting apart certain lots for public buildings. By another Act passed in September, 1788, entitled "An act for erecting certain parts of the counties of Westmoreland and Washington into a separate county," commissioners were appointed, empowered and directed within five years thereafter to select any of the lots set apart for public buildings in the said "Reserve Tract," and to erect thereon a Court-House and jail sufficient to accommodate the public business of the county. The Act of 13th April, 1791, (see Carey & Bioeren's Laws, p. 37, § 1586), repealed so much of the last mentioned act as required the commissioners to erect the Court-House and jail on the "Reserve Tract" and authorized and required them to purchase lots in the town of Pittsburgh on which to erect a Court-House and jail. Under this authority the commissioners named, purchased lots and erected a Court-House and jail. This fixed the county seat of the county of Allegheny in the town of Pittsburgh.

The new Constitution in Section 7, Article III, under the head of "Prohibited Legislation," prohibits "locating or changing county seats, erecting new counties or changing county lines." It will thus be seen that the location of the Court-House anywhere else than in the city of Pittsburgh can only be effected by a *general act* of the Legislature. This should dispose of the question of moving the county buildings to Allegheny City.

Supreme Court, Penn'a.

O. H. PERRY SHREVE and ELIZA COOPER,
 Defendants Below, v. SILAS WHEELER.

When it is sought to charge a purchaser with notice of a parol defeasance accompanying a recorded deed, evidence that he knew there was *some* contract collateral to the conveyance, and that he paid money on account of the debt mentioned in it, is enough to send the case to a jury to determine whether he had actual knowledge that the contract contained a defeasance.

Error to the Court of Common Pleas of Crawford county.

Israel Shreve held the title to the land in dispute, the sole beneficial interest being in O. H. P. Shreve. The latter borrowed from Wheeler, the plaintiff, a certain sum of money, giving as security a deed for the same land, absolute on its face, executed by Israel Shreve, and taking an agreement for a conveyance to himself upon payment of the debt. The deed was recorded, but not the defeasance. While the title stood thus, Eliza Cooper recovered judgment against O. H. P. Shreve, levied on this land and bought it at the sheriff's sale. Then this action of ejectment was brought by Wheeler against Shreve and Cooper.

It appeared at the trial that before he obtained his judgments Cooper had some knowledge of the existence of the contract between Wheeler and O. H. P. Shreve, though not necessarily of its contents; and that he had actually paid money on account of the debt mentioned in it, and had the receipts therefor indorsed upon it.

The court was asked to charge that at the date of the entry of Cooper's judgments there was no evidence that he had any notice of the transaction between Wheeler and Shreve, except the record of the deed, which was refused. The charge contained the following passage: "You will bear in mind that Cooper's right begins probably when he entered judgment. At all events it became perfect at the time he became a purchaser at sheriff's sale. If he purchased without notice of any of this transaction, the Supreme Court has said he purchased free and clear of that parol agreement as testified to by Perry Shreve. He was bound to know as a matter of fact that Wheeler had the legal title, because Wheeler's deed was upon record." The refusal of the point and the extract from the charge formed the only assignments of error.

Counsel for the plaintiff in error argued that Wheeler's deed and the agreement together were a mortgage, and therefore ought to have been recorded in order to charge Cooper with notice,

unless it be shown that he had actually received it from some other source. The testimony of Wheeler [given at length in the opinion, *infra*], is not sufficiently explicit on that point. Specific notice of this parol mortgage ought to have been proved.

It was error for the court to charge that Cooper was not bound by the agreement if he purchased without notice of *any* of this transaction, and then to say that he was bound to know of the deed to Wheeler, because it was recorded. That was equivalent to an instruction to find for the plaintiff. An absolute deed and a defeasance made at the same time constitute a mortgage, and the recording of the deed without the defeasance will not give it a lien: *Findlay v. Hamilton*, 17 S. & R., 70; *Bank v. Bank*, 7 W. & S., 335; *Wilson v. Shoenberger*, 7 Casey, 295; *Corpman v. Beccasters*, 3 Norris, 363; *Page v. Wheeler*, 11 Id., 282. If Cooper's debt was contracted without notice of that parol defeasance, it would not affect his right to priority over such unrecorded mortgage: *Britton's Appeal*, 9 Wright, 172; *Hulings v. Guthrie*, 4 Barf., 123; *Uhler v. Hutchinson*, 11 Harris, 110. The charge that Cooper's right began when he entered judgment, at all events, it became perfect at the time he became a purchaser at sheriff's sale is not justified by the authorities and misled the jury.

Counsel for the defendant in error argued that the deed to Wheeler was not a mortgage, but a *bona fide* conveyance, and the agreement not a defeasance, but a contract to sell the land to O. H. P. Shreve. To establish that the intention of the parties was to create a mortgage, the proof must be clear, and show, not merely declarations, but facts inconsistent with the idea of an absolute purchase: *Todd v. Campbell*, 8 Casey, 250; *Penn'a Co. v. Austin*, 6 Wright, 257; *Payne v. Patterson*, 27 P. F. Smith, 134; *Moore v. Small*, 7 Harris, 461.

Even treating the transaction as a mortgage, the evidence shows that Cooper knew of it, for he paid money on account of it. He is therefore bound by that knowledge: *Jaques v. Weeks*, 7 Watts, 261; *Doryan v. Blocker*, 12 Harris, 28. Cooper's judgment was a lien only upon the equitable title of O. H. P. Shreve, and that was what he bought at the sale. He took it subject to all the incumbrances: *Chew v. Barnett*, 11 S. & R., 389; *Whitfield v. Faussett*, 1 Ves., Jr., 371; *Rhines v. Baird*, 5 Wright, 256; *Reed v. Dickey*, 2 Watts, 459; *Kramers v. Arthurs*, 7 Barr, 165.

Opinion by GREEN, J. Filed January 9, 1882.

In this case the learned court below left to the jury, with the most precise and emphatic

instructions, the question whether the transaction between Perry Shreve and Wheeler was a contract of sale or a loan. The jury were told that if they found it to be in reality a loan, then in legal effect the papers executed and delivered between the parties constituted a mortgage, and as the paper thus treated as a defeasance was unrecorded, it would be an unrecorded mortgage by which Cooper would not be bound unless he had notice. If he had notice he would be bound by it and must pay to Wheeler the remainder of the mortgage money. In this view of the legal and equitable rights of the parties, there was clearly no error, nor was it claimed that there was, on the part of the plaintiff in error. The jury has found the facts against the defendant. Under the charge they must have found either that the transaction was in reality a sale, as the form of the papers would indicate, or if it was a mortgage, that Cooper had notice of it. As this finding, in in either aspect, involved only a question of fact, and was based upon sufficient testimony to support it, the matters assigned for error are extremely limited in number and much confined in their character. There are but two of them. The defendants by their fifth point asked the court to say that there was no evidence that Cooper had notice, at the date of entering his judgment, of the agreement between Wheeler and Perry Shreve in relation to borrowing money and accepting the deed from Israel Shreve. This the court declined to do, but left the question to be determined by the jury. In this we think there was no error. The deed from Israel Shreve and wife to Wheeler of November 28, 1868, in express terms passed the legal title. It was in the ordinary form of a deed in fee simple without condition or qualification, and on the face of the papers Israel Shreve was at that time the unquestioned owner of the legal title. The next paper in the course of the title was a written contract dated November 30, 1868, signed by Wheeler and Perry Shreve, stipulating in terms for the sale and conveyance by the former to the latter, of the land in dispute, upon the payment of specified sums of money at definite times. On the part of the defendants it is alleged that these sums of money, instead of representing the purchase money of the land upon an independent contract of sale, represented in reality a loan of fifteen hundred dollars previously made by Wheeler to Perry Shreve, and the interest thereon, and hence that the agreement of sale of 30th November, 1868, constituted in legal effect a defeasance to the absolute deed from Israel Shreve to Wheeler, dated November 28,

1868. Supposing this to be so, was there any evidence in the case that Cooper, the judgment creditor of Perry Shreve, had notice, at the time of entering his judgment, of this alleged contract of defeasance? That is the only question raised by the first assignment of error. Israel Shreve, the grantor in the deed to Wheeler, testified as follows:

"Q.—Did you know of a contract of Wheeler to sell this land to your brother Perry?

"A.—Nothing particular about it; nothing more than my brother said he was going to make a contract with him to get it back, at the start, but afterwards the contract was assigned to me.

"Q.—Do you know of Cooper paying money on it?

"A.—Yes, sir; I was there once when Cooper paid—I think it was fifty dollars, which is the only time I remember of his being there.

"Q.—Who did he pay the money to?

"A.—He paid it to Silas Wheeler.

"Q.—Who was it for?

"A.—For Perry Shreve.

"Q.—What for?

"A.—He said he wanted to pay it in; he said he wanted to help Perry, and he would pay that much on the contract; I do not know whether the contract was there, or whether he agreed to put it on as soon as he got home.

"Q.—What was said about what the contract was?

"A.—The contract of this farm from Wheeler to Perry Shreve.

"Q.—You say that was talked about in the presence of Cooper and Mr. Wheeler?

"A.—Yes sir."

Silas Wheeler, the plaintiff below, testified as follows:

"Ezra Cooper paid me fifty dollars on May 6, 1869, as shown on the contract. He paid me in his office in Union. He also paid me fifty dollars June 21, 1869, as indorsed on the contract. I gave Cooper receipts at the time for the amount paid, and Cooper also requested me to indorse the payments on the contract, and Cooper said he was making the payments for Perry Shreve. I think I had a copy of the contract with me, but am not sure. We did not talk particularly about the contract; only that he (Cooper) wanted me to make the credits upon the contract. When Cooper made the payments he knew I had bought the farm." * * *

"Q.—Why do you say Cooper knew the contents of the contract between you and Shreve?

"A.—I didn't say that Cooper knew all the contents of the contract. He knew there was such a contract or he couldn't have wanted me to make the indorsements upon it.

"Q.—Did you tell Cooper what the contract was about at the time you say he paid you money on it, or before that?

"A.—I think I told Cooper I had given Perry a contract the first time he made a payment.

"Q.—Did Cooper tell you what the contract was about on which he was paying you the money?

"A.—I think he did.

"Q.—What did Cooper say when he paid you the money; can you give his words?

"A.—He desired me to put it on the contract.

"Q.—You had not the contract with you, had you?

"A.—I don't know whether I had the contract with me or not; I gave him a receipt and agreed to put it on the contract."

In addition to the foregoing there was given in evidence the contract itself, with the following receipts indorsed upon it:

"May 6, 1869, received fifty dollars at the hands of E. Cooper to apply on this contract. (Receipt given.)

"S. WHEELER."

"June 21, 1869, received fifty dollars at the hands of E. Cooper. (Receipt given.)

"S. WHEELER."

The original receipt given to Cooper for the payment of June 21, 1869, being produced, reads as follows:

"June 21, 1869, received of O. H. Shreve, at the hands of E. Cooper, fifty dollars to apply on a land contract.

"SILAS WHEELER."

Mr. Cooper being a party to the suit, and most essentially interested in its result, made no denial of any of the foregoing testimony.

In this situation of the evidence it would have been manifest error for the court to say there was *no* evidence of the agreement between Wheeler and Perry Shreve in relation to borrowing money and accepting the deed from Israel Shreve. Here was direct and uncontradicted testimony to the effect that Cooper had, as Perry Shreve's agent or friend, paid money on the very contract which is alleged to create in part or in whole the defeasance relied upon. There was already sufficient notice to put Cooper upon inquiry, if not actual knowledge of the contents of the contract. Whether the agreement be treated as a contract of sale, or as part of a parol contrivance for a loan, is immaterial, for in either event Perry Shreve's title was not to be completed till the money was all paid, and that was sufficient to charge Cooper with the obligation of such payment, if he took the title after knowledge of the written contract. With the credibility of the witnesses we have nothing to do, and suggestions on that subject are out of place here. The meaning, the truthfulness, and the effect of the testimony as applicable to the true relations of the several parties, were exclusively for the consideration of the jury.

As to the second assignment, we can see no error in the statement by the court that "Cooper's right begins probably when he entered judgment," for the reason that there is not a particle of evidence on this record to show that his debt was contracted at any time before the judgment was entered. It is entirely possible that the judgment was entered immediately after the debt was contracted, and there is nothing in the case upon which we can base a contrary assumption. The language of the judge, as quoted in the specification, is qualified by the use of the word "probably," and therefore it is not a positive assertion as to the date of the

inception of Cooper's right, though it might well have been so under the evidence. We no doubt think the remaining matter of this specification is fairly subject to the criticism made by the learned counsel for the plaintiff in error. The court did not say or intimate that the recording of the deed from Israel Shreve to Wheeler was notice of the defeasance, nor of anything more than the mere fact of the deed itself. On the contrary, in the answer to the defendant's seventh point, and again in the general charge, the court distinctly told the jury that the record of the deed was no notice whatever to Cooper of the parol mortgage, if there was such a mortgage, and that Cooper was in that event not bound by anything appearing on the record. This, we think, was a correct and sufficient expression of the rights of Cooper in the premises, and therefore seeing no error in the record, *The judgment is affirmed.*

For plaintiffs in error, defendants below,
Messrs. William R. Bole and J. W. Sproul.
Contra, Joshua Douglass, Esq.

**MESSERSMITH, Defendant Below, v. THE
SHARON SAVINGS BANK, to use, etc.**

The entire capital stock subscribed of a corporation is a trust fund for the protection of creditors; and a subscriber cannot avoid his obligation for an unpaid subscription, by assigning his shares to another person, although the corporation officers assent to such transfer and it is filed on the books of the company.

Error to the Court of Common Pleas of Mercer county.

Debt by the bank, to use, against Messersmith, to recover a balance of seventy-five per cent. of his subscription to the capital stock of the bank.

The court below, McDERMITT, P. J., filed the following opinion on entering judgment for the bank on a point reversed:

"The material facts which the jury would, under the evidence have found, and upon which the defendant asked the court in his points to instruct the jury, that he was not liable, are: The legal plaintiff was duly incorporated on the 10th of September, 1869. Its capital stock was \$50,000, divided into one thousand shares, twenty-five of which were subscribed by the defendant. The corporation having become insolvent, made an assignment to the use plaintiff for the benefit of creditors, on the 16th of September, 1878. Prior thereto only twenty-five per cent. of the original stock had been called in by the board of managers, and which the defendant had paid on his shares. He then in good faith and before said assignment was

made, or the insolvency of the incorporation was known to him, and with the knowledge and assent of the bank, transferred his stock to F. Buhl. Since the assignment the directors have called in the unpaid seventy-five per cent. of the original stock, and the defendant refusing to pay the assessment upon his said shares this suit was brought for the collection of the same, and for the payment of the bank's liabilities. Whether he is liable under the facts above stated is the legal question reversed.

"Common honesty, elementary law, and all the decisions, State and National, regard the capital stock of a corporation as a trust fund for the benefit and protection of its creditors. Neither the directors nor the stockholders, nor both combined, can withhold the same from the reach of the corporation's creditors. The stock so held in trust is the entire subscribed stock, not merely the paid in per centage. Whatever legal acts the board of directors may perform relative to the mode and manner of collecting the capital stock, they cannot by any device whatever, release the liability of both the original stockholder and his assignee from the payment in full of the stock originally subscribed when the same becomes necessary for the payment of the corporation's debts; and as our own Supreme Court holds in the *Pittsburgh and Baltimore Coal, Coke and Iron Co. v. Otterson*, 4 W. N. C., 545, that an assignee of such stock is not liable in a suit by the corporation to collect the assessments made thereon subsequent to his purchase of it, though he agreed with his assignor at the time of the assignment, to pay them, and though, too, he did pay some of them, and though he was as the owner of such stock elected a director and acted as such, it follows as a legal corollary that the original subscriber must be, or no one is."

The entry of judgment for plaintiff on the reserved question was assigned for error.

For plaintiff in error, *Messrs. Stranahan & Mehard and John McClure.*

Contra, Messrs. Griffith & Son and Thomas Tanner.

Opinion by GORDON, J. Filed January 3, 1881.

It is difficult to understand upon what principle Messersmith seeks to avoid his obligation to the plaintiff corporation. There was no doubt about his liability when he subscribed for the stock, but he now seems to think that he ought to be released by virtue of his assignment to McCarter. Exactly why this should be so, why he should be discharged from his contract, by the mere fact of his assignment of it to a third

party, has not been made clear to us. Had McCarter agreed with the bank to assume this obligation, and had the bank thereupon executed a release to Messersmith, the matter would be of easy comprehension, but that the transfer of the stock without more, should have the effect contended for, cannot be admitted. It is said, the bank officers assented to the transfer, and that it was made on the books of the bank; concede this to be so, that does not help the matter, for McCarter did not thereby assume the unpaid installments of the stock subscription; neither was Messersmith thereby released: *Frank's Oil Co. v. McCleary*, 13 P. F. Smith, 317; *Coal Co. v. Otterson*, 4 W. N. C., 545.

Furthermore, as was well said by the learned judge of the court below, the capital stock of a corporation is a trust fund for the protection and benefit of creditors, and this extends to the entire stock subscribed, and not merely to the per centage paid in. This is true; and with him we are inclined to think that such stock would be sorry security for creditors if the subscriber could, at any time, cast off his liability by a transfer to another party, who, as we have seen, thereby assumes no liability to the corporation.

On no principle of law or morals can the doctrine advocated by the defendant be sustained, since it, in effect, makes the execution of the contract depend wholly upon the will of the obligor.

Judgment affirmed.

THE HUMBOLDT FIRE INSURANCE CO.,
Defendant Below, v. **HENRIETTA MEARS,**
Guardian.

Whether preliminary proofs of loss have been actually given to the insurance company is a question of fact for the jury. Whether the proofs furnished are sufficient is for the court.

As to the keeping and using benzine or other inflammable oils on the premises, *Mears v. Insurance Co.*, 27 PITTSBURGH LEGAL JOURNAL, 81 followed.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action on a policy of insurance issued by the plaintiff in error to Thomas Mears, on January 8, 1874, on his mill and distillery, located at Steubenville, Ohio, to the amount of \$1,500. At the time of the issuing of the policy the mill and distillery were not in operation. Mears had effected other insurance, amounting to about \$30,000.

Among other conditions in the policy were the following: "1. Voids a policy. It is a condition of this insurance, that, if the assured shall keep or have in any place or premises, where

this policy may apply, petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish or any product, in whole or in part of either, or gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda; or keep, have, or use camphene, spirit gas, or any burning fluid, or chemical oils, without written permission in this policy, then, and in every such case, this policy shall be void."

In May or early part of June, 1874, Mears ordered John Kessler to purchase at Orr's refinery, in Steubenville, in the name of Collins Bros., one barrel of carbon oil. This oil was taken to the bonded warehouse of Mears, a building some sixty feet distant from the insured premises. Subsequent to the purchase of this carbon oil, two cans, containing carbon oil and benzine, each of eight or ten gallons, were purchased by Mears and taken to the bonded warehouse. When the cans were deposited in the bonded warehouse the barrel of carbon oil had been removed.

The policy granted permission to the assured to make repairs.

On the night of the 30th of September, 1874, the insured premises were burned. The benzine was used in cleaning machinery, by William Jacobs, who worked at it for two weeks continuously, and finished about two weeks before the fire.

He got no carbon oil out of the bonded warehouse, but got it out of a barrel in the fire-room, a part of the premises covered by this policy. According to the same witness, there was not a gallon of oil in the barrel when he commenced, which he used all but a quart. The witness did not know when the barrel was placed there. He was told by Mr. Mears that there was a little in the barrel.

The same witness testified that in using the benzine he kept the windows and shutters closed, and was enabled to see by the aid of an unscreened miner's lamp. It was proven that the carbon oil on the premises was a product of petroleum, and that the benzine was highly inflammable and of the nature of camphene or spirit gas.

Proof of loss were furnished the Humboldt Company, by the defendant in error. These were insufficient, and defendant company notified plaintiff that the proof furnished was insufficient, and pointed out to her wherein it should be amended. An amended proof of loss was furnished, but was rejected by the defendant company as insufficient and not covering the defects pointed out in the original proof. No further proof of loss was furnished by plaintiff.

The plaintiff submitted the following points, *inter alia*:

2. That if the jury find from the evidence that Thomas Mears, the assured, was insane at the time or shortly after the loss, and incapable of making such proofs of loss as are required by the policy, he was thereby relieved or excused from a compliance with, or performance of that condition of the policy. Affirmed.

6. That the condition of the policy under which the defendant resists a recovery in this action which provides that "if the assured shall keep or have in any place or premises where this policy may apply, petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish, or any product in whole or in part of either, or gunpowder, fire works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda; or keep, have or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void," must be interpreted and understood as forbidding only the habitual keeping, storing or having these articles on the insured premises. Therefore, if the jury find from the evidence that the benzine and carbon oil referred to by the witnesses, were but temporarily or occasionally upon the insured premises, or were only used for the purpose of cleaning machinery and needful light, then and in that case, such temporary and occasional use does not avoid the policy. Affirmed.

For plaintiff in error, defendant below, *Messrs. Thos. M. Marshall and Schoyer & McGill.*

Contra, Messrs. Weir & Gibson and J. Dunbar.

PER CURIAM. Filed October 24, 1881.

Whether preliminary proofs of loss have been actually given to the insurance company is a question of fact for the jury. Whether the proofs furnished are sufficient is for the court. There is no question that proofs of the loss were furnished, the only points made was as to their sufficiency. We are of opinion that the amended proofs of loss were sufficient. This being the case, the point of the effect of the insanity of the insured, raised in the plaintiff's second point was immaterial. The answer of the court may be conceded to have been wrong, but it did no harm to the plaintiff in error. As to the other assignments, as to the keeping and using benzine or other inflammable oils on the premises, the answers to the points and the instructions of the court in the charge, were altogether accordant to the opinion of this court, when the case was here before—27 PITTSBURGH LEGAL JOURNAL, 81; 9 *Weekly Notes*, 108.

Judgment affirmed.

OUR STATE REPORTS.

First Outerbridge.

If this volume is a fair sample of the new State Reporter's future work the members of the bar will find that they will have to purchase a very large amount of padding, in the shape of contents, index, statement, arguments of counsel, etc. Of the six hundred and twenty-nine pages, the table of contents occupy fourteen; index, sixty-nine; statements and arguments of counsel, *three hundred and fifty-two*, and opinions, *one hundred and ninety-four*. In other words, about seventy per cent. of the book is filled with matter that should be reduced by one-half.

The volume contains the reports of cases argued before the Supreme Court in Philadelphia in the months of January, February and March, 1881. There are two cases of original jurisdiction and seventy-seven cases on appeals and writs of error from the county courts. Of these, twenty-seven were affirmed and fifty reversed, viz:

	Affirmed.	Reversed.
Com. Pleas, No. 2, of Allegheny Co.....	1	—
Com. Pleas, No. 1, of Philadelphia Co....	3	4
“ 2, “	5	5
“ 3, “	2	4
“ 4, “	2	3
Orphans' Court “	2	4
Quarter Sessions “	—	1
Com. Pleas, etc., of Berks County.....	1	7
“ “ Lehigh County	—	1
“ “ Luzerne County	—	2
“ “ Bradford County	—	5
“ “ Schuylkill County ..	4	3
“ “ Wyoming County....	—	2
“ “ Delaware County.....	—	1
“ “ Chester County.....	2	2
“ “ Montgomery Co.....	2	—
“ “ Monroe County.....	1	—
“ “ Lackawanna Co.....	1	2
“ “ Northampton Co....	1	4

No doubt other cases were heard and decided, but not marked to be reported. In twelve cases there were dissents. In five cases, three judges dissented; in two cases two; and in the others one. Chief Justice SHARSWOOD dissented in 5 cases, Justice MERCUR in 4, Justice GORDON in 6, Justice TRUNKY in 4, Justice STERRETT in 2, Justice GREEN in 3.

There are eighty-four opinions given (in some cases more than one, there being different appellants or plaintiffs in error), as follows:

By Chief Justice SHARSWOOD, two, covering four pages; Justice MERCUR, twenty-six, covering forty-one pages; Justice PAXSON, nineteen, covering sixty-five pages; Justice GORDON, eighteen, covering thirty-six pages; Justice TRUNKY, eighteen, covering forty-five pages; Justice STERRETT, one, covering three pages.

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Editor.

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No. 41.

PITTSBURGH, PA., MAY 24, 1882.

Supreme Court, Penn'a.

WILSON'S APPEAL.

Where the chief beneficiary in a will was the confidential adviser of the testator, and was the main instrument in procuring the preparation and execution of the will, he will be required to prove affirmatively the circumstances connected with the drawing of the will, that the testator was laboring under no mistaken apprehension as to the value of his property and the amount he was giving his confidential adviser, and that such gift was the free, intelligent act of the testator.

The court below in this case granted an issue as to the question of undue influence, and refused an issue upon the question of testamentary incapacity.

Held, that the evidence upon the latter point amounted to more than a *scintilla*.

In a case where the person is of great age, suffering from severe illness affecting his brain and vital powers, and where an investigation of a charge of undue influence is admittedly essential, it is best not to limit the investigation to that one matter. Under such circumstances undue influence and mental incapacity are very closely interwoven.

Appeal from the decree of the Orphans' Court of Philadelphia county.

Opinion by GREEN, J. Filed March 13, 1882.

We concur entirely with the learned judge of the court below in the statement of the reasons which induced the court to grant the issue prayed for in this case, to try the question of undue influence. The opinion expresses very clearly and forcibly the considerations which bring the case within the ruling of *Boyd v. Boyd*, 16 P. F. Smith, 283, and *Cuthbertson's Appeal*, 38 *Legal Intelligence*, 124. William Wood was one of the chief beneficiaries named in the will, and he was the main instrument in procuring the preparation and execution of the will in question. He was, moreover, a trusted and confidential friend and adviser of the testator, who consulted him in relation to his business affairs. The testator had in 1873, when in undoubted health of body and mind, executed a will in which neither Mr. Wood nor his son and daughter, the other residuary legatees, were mentioned. The changes wrought in that will by the one in controversy executed seven years later, are of the most radical character. In view of these facts, and of the great age and physical infirmity of the testator, we cannot doubt the

propriety of an issue to determine whether undue influence was exerted to produce the will in controversy. The principles stated by the present Chief Justice in *Cuthbertson's Appeal*, *supra*, become entirely applicable. "Every man who draws a will in his own favor, under such circumstances, should know that he will be required to prove affirmatively all the circumstances connected with the drawing of the will, and that it must appear that the alleged testator was laboring under no mistaken apprehension as to the value of his property and the amount he was giving to his confidential adviser." He must "make it clearly appear that the gift to him was the free, intelligent act of the testator."

We find ourselves unable, however, to agree with the court below in restricting the issue in this case to the question of undue influence alone. There was considerable testimony given in support of the allegation of mental incapacity of the testator at the time of the execution of the will in question. He was nearly eighty-nine years of age. He had been prostrated a few days before by a most severe attack of acute pneumonia. He was in a condition of stupor which, as the attending physician said, "was becoming more and more serious." The latter also testified: "The delirium was the mildest form of the brain disorder, and the stupor indicated that the brain was becoming more seriously involved." He was taken ill on October 22, 1880, with acute pneumonia, involving both lungs, and which reached its fullest intensity in about three days, remaining of that character for about a week. The will was executed on the 28th of October and the testator died on November 5th following. The sickness continued about two weeks, and in the midst of it the testamentary paper in controversy was prepared and signed. The attending physician, an entirely disinterested person, who had every opportunity to observe and consider the testator's condition, testified that in his opinion he was mentally incompetent to make a will.

The will in question being read to the witness, he was asked:

Q.—From your knowledge of Mr. Rea's condition, do you believe it possible for him to have understood and comprehended such a paper on the eighth day of his sickness? A.—I don't think so.

Q.—If the will which has been read to you had been properly and carefully explained to him, is it possible that he could have understood it? A.—No.

There was much other testimony from a number of witnesses, who testified to their belief in the mental incapacity of the testator, giving

Under the instruction of the court the verdict was for the defendants.

The assignments of error raised the questions, first, whether the paper operated to release the land last sold without payment of the lien, that being mentioned as a condition; and second, whether, if that land was released, the other tracts were also released.

Counsel for the plaintiff in error argued that the paper was void, by reason of having been obtained by misrepresentation and fraud, even though not that of the vendees or their agents. They cannot have the benefit of it. Nor can they claim that she is estopped unless they acted on the faith of it. Whether they did so was a question for the jury.

The release had no effect upon the land previously sold unless Mrs. Snyder knew of the conveyances.

Counsel for the defendant in error contended that no fraud could have been practiced upon Mrs. Snyder, because she could have known from the records that the purchase money was insufficient to pay all the liens which were ahead of hers. It is to be presumed that the purchasers knew of the existence of the release: *Cover v. Black*, 1 Barr, 493; and no evidence was given to rebut that presumption. There was, therefore, nothing to go to the jury on this point.

The land last sold was primarily liable for the payment of this judgment, and those previously sold were in the position of surety: *Nailor v. Stanley*, 10 S. & R., 450; *Cowden's Estate*, 1 Barr, 267; *Mercy's Appeal*, 4 Id., 86; *Paxton v. Harrier*, 1 Jones, 314; *Lowry v. McKinnic*, 18 P. F. Smith, 294; *Martin's Appeal*, 9 W. N. C., 484. A release of the last is, therefore, also a release of the others. This rule is not changed by the fact that the releasor had no notice that the other lands had passed out of the hands of the judgment debtor: *Holt v. Bodey*, 6 Harris, 207.

For plaintiff in error, *J. McD. Sharpe, Esq.*
Contra, Messrs. O. C. Bowers and Kennedy & Stewart.

Opinion by MERCUR, J. Filed October 3, 1881.

The plaintiff held a judgment against Martin B. Wingert, which was a lien on three tracts of land. On 28th of September, 1875, she executed a writing whereby she agreed that the agents of the owner of the land should sell one of the tracts clear of the lien of her judgment, provided the money produced by the sale be applied to the payment of her judgment according to its priority of lien. On the 2d of October fol-

lowing the tract was sold and conveyed to Adam Small and Henry Small, two of the defendants. On distribution of the proceeds according to priority of liens, the money did not reach the judgment of the plaintiff. Thereupon she afterwards issued this *scire facias*, with notice to all who had purchased lands originally bound by her judgment.

On the trial it appeared that prior to her execution of the writing, Wingert had sold and conveyed the two other tracts of land, one to Burkholder, on the 2d of April, 1875, the other to Christian Wingert, on the 1st of September, 1875.

The assignments of error present two questions. One, whether the Smalls took the land conveyed to them discharged from the lien of the judgment; the other, whether the instrument she executed operated as a discharge of the lien on the lands previously conveyed by Wingert.

1. The plaintiff claims she executed the writing relying on representations made to her that her judgment would be paid in full out of the proceeds of the sale about to be made to the Smalls. The latter, however, made no such representations, nor did any person acting in their behalf. If she was misled by the counsel and opinion of her own friend and adviser, the defendants are not to be prejudiced thereby. The payment of the judgment was not a condition precedent to the sale or to divesting the lien. The application of the money was intended to be made after the lien was divested. She authorized the sale to discharge her lien. The authority to the attorneys to sell existed. The Smalls having purchased and paid the purchase money in good faith, their title cannot be impaired by verbal declarations made to her without their authority or knowledge. Nor does it matter whether they had knowledge of the contents of the paper. The vendors having full power to sell, the purchasers took the title discharged from the lien. The first three assignments are not sustained.

2. The writing clearly indicates an intention to discharge from the lien those lands only thereafter to be conveyed. She expected the judgment to be paid out of the proceeds, but she did not intend to release, nor did the writing profess to release, any other lien or security she held. She had no knowledge of the previous conveyances. She was under no obligation to examine or inquire if such had been made. It is claimed that inasmuch as the deed to Burkholder had been recorded on the 17th May, 1875, she had constructive notice of the conveyance. Undoubtedly that would have been notice to

one about to take a conveyance from Wingert that he had previously conveyed, but it is not such notice as to prevent her from releasing the lien on some of the lands, and keeping it good on other lands bound thereby. If the vendees under prior conveyances desired to prevent her from releasing the lien of her judgment on other lands of the defendant, they should have distinctly notified her, before her release, of their purchases, and cautioned her against doing any act by which their rights might be diminished. Nothing less than this would prevent her from releasing the lien on a part of the lands, and holding it good on others: *Taylor's Executors v. Maris*, 5 Rawle, 51; *McIlvain v. Mutual Assurance Co.*, 8 W. N., 260; *Wilbur's Appeal*, 10 Id., 133. Even in case of a judicial sale, when a creditor, having a lien on two funds, suffers the proceeds of one to be applied to other incumbrances, he is not thereby estopped from claiming out of the other fund when converted into money: *Addams v. Heffeman*, 9 Watts, 529.

The right to prevent a judgment creditor from releasing a part of his security must be invoked before the release is executed, and before the rights of others have been affected thereby.

The view we take of this case in no manner conflicts with the rule applicable in case of a judgment against principal and surety, and the creditor releases the land of the principal and seeks to hold the surety; nor with the right of one who has purchased a part of the lands bound by a judgment to compel a sale of the defendant's remaining lands before his shall be sold by execution. He cannot, however, remain inactive until after his land is sold and the purchaser has obtained a deed therefor, and then affect the title of the purchaser. The doctrine of subrogation is not applicable to the present case. The remaining assignments are therefore sustained.

Judgment reversed and venire facias de novo awarded.

THE WAYNESBORO MUTUAL FIRE INSURANCE CO. v. CONOVER.

A policy of insurance contained a provision that no suit should be brought upon it after six months from the time of fire, and that none of its stipulations should be waived but by the written consent of the president and secretary. Held, that, under such a contract, the company would not be estopped by the act of a general agent who represented that payment would be made amicably, and suggested that the assured forbear to sue.

Error to the Court of Common Pleas of Franklin county.

A. V. Conover & Co. brought covenant against The Waynesboro Mutual Fire Insurance Com-

pany on a sealed policy of insurance for \$1,000 on a building at Long Branch, N. J., known as the Metropolitan Hotel. While the policy was in force, the premises were totally destroyed by fire. Suit was not begun for more than two years, notwithstanding a condition in the policy that no suit or action thereupon should be sustainable unless brought within six months after the fire. At the trial the plaintiff produced some evidence to show that compliance with this provision had been excused by the action of the company, through its agent, one Reynolds, who had recommended delay on the ground that the company was in some difficulty, and would pay without suit as soon as an assessment had been levied and collected. The contract between Reynolds and the company showed that he had the powers of a general agent. The policy contained a clause to the effect that no waiver of any of its stipulations should be valid unless in writing, and under the signature of the president and secretary. The court charged that there was no evidence of a waiver, but that a general agent could, by inducing postponement on the ground that payment would be made, estop the company from claiming the benefit of the forfeiture.

The verdict was for the plaintiff.

The assignments of error raised the question as to the power of the general agent to estop his principals, and as to the validity of the proofs, etc., of loss, but this latter point is not adverted to in the opinion of the court above.

Counsel for the plaintiff in error argued, that the representations of Reynolds, not being within the scope of his authority, could not estop his principal: *Mitchel v. Insurance Co.*, 1 P. F. Smith, 402; *Hackney v. Insurance Co.*, 4 Barr, 185; *Glass v. Building Association*, 9 W. N. C., 326; *Hanson v. Insurance Co.*, 9 Allen, 231. The stipulation as to the time of bringing suit is valid: *Warner v. Insurance Co.*, 37 Legal Intell., 475.

Counsel for the defendant in error argued, that, although the agent had not authority to waive the conditions of the policy, he could nevertheless make the statement that the company would pay without suit, and it would be estopped if the assured acted thereupon: *Mentz v. Insurance Co.*, 29 P. F. Smith, 475; *Insurance Co. v. Masonheimer*, 26 Id., 138; *Insurance Co. v. Mowry*, 6 Otto, 544. The company cannot reap the fruit of its agent's misrepresentation: *Jones v. Building Association*, 37 Legal Intell., 465; *Musser v. Hyde*, 2 W. & S., 314; *Hunt v. Moore*, 2 Barr, 105; *Mundorff v. Wickersham*, 12 P. F. Smith, 87; *Keough v. Leslie*, 37 Legal Intell., 40; *Eichelberger v. Insurance Co.*, 8

Norris, 468; *Smith v. Insurance Co.*, 8 *Id.*, 292; *Schroeder v. Insurance Co.*, 2 *Phila.*, 286.

For plaintiffs in error, *Messrs. Jere Cook and Joseph Douglas.*

Contra, Messrs. J. McDowell Sharpe and G. W. Welsh.

Opinion by GREEN, J. Filed October 3, 1881.

This was an action on a policy of insurance against loss by fire. The building insured was destroyed by fire on April 26, 1876. The summons was issued on June 20, 1878, more than two years after the loss occurred. The 16th condition of the policy is in the following words, viz: "It is furthermore hereby expressly provided, that no suit or action of any kind against the company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of six months next after the fire, and in case any such suit or action shall be commenced against said company after the expiration of said six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

Amongst the defences set up against the plaintiff's right of action was the limitation contained in the foregoing condition. The validity of such a defense is established by the decision of this court in the case of *Warner v. The Insurance Company of North America*, 37 *Legal Intell.*, 475, and is a necessary consequence of the express provisions of the contract. All this is conceded by the learned counsel for the plaintiff. But they contend that the defendant is estopped from availing itself of this defense because one who, as they allege, was the general agent of the company said to them before the six months had expired, and upon being informed of their intention to bring suit, that it was not necessary to sue, that the company was somewhat embarrassed, but had made, or was about to make, an assessment, and the loss would be paid without suit, and thereupon the plaintiff, trusting to these representations, forbore to bring suit until after the six months had expired. The learned court below admitted the evidence offered in support of this allegation under objection and exception by the company and left to the jury the question whether the representations had been made as alleged, charging that, if believed, they constituted an estoppel against the defendant as to this defense.

The action of the court on this subject is made the basis of several assignments of error. We have reached the conclusion that these assign-

ments are sustained, and that on them the case must be reversed.

To the reply of estoppel the company responded with the ninth condition of the policy, which is in the following words: "And said company shall in no case be deemed to have waived a full, literal and strict compliance with and performance of each and every of the terms, provisions, conditions and stipulations in this policy contained and hereto annexed; to be performed and observed by and on the part of the insured, and every person claiming by, through or under them, unless such waiver be express and manifested in writing, under the signature of the president and secretary of said company."

It will be perceived by this language that both parties, the plaintiff as well as the defendant, agreed, as a part of the policy, that there should be no waiver of a strict compliance with any condition, unless such waiver should be expressed in writing, and signed by both the president and secretary of the company. It is not pretended there was any such waiver. It is not alleged that either the president or secretary agreed or asserted that the policy would be paid without suit, or that no suit need be brought on it. The utmost that is asserted is that Reynolds, the agent, who effected the policy, made such statements. These statements were communicated by plaintiffs to their counsel, who thereupon advised them to let the matter drop. Mr. Reynolds gives a different version of the conversation, and testifies that he told Dr. Conover that if any suit was to be brought it would have to be done within a specified time. The court below allowed a recovery upon the effect of the verbal declarations of Reynolds operating by way of estoppel. But the contract of the parties expressly excluded Mr. Reynolds as a person who could make any binding declarations on the subject, whether written or verbal. Only the president and secretary combined could dispense with the necessity of bringing suit within six months, and that by an agreement or declaration in writing. To this the plaintiffs agreed in and as a part of the very instrument upon which this suit is brought. In such circumstances the declarations or statements of Reynolds, waiving the performance of conditions, are absolutely nugatory. The parties have so agreed, and the courts have no right to alter the agreement of the parties in this respect or in any other. Solemn contracts of parties reduced to writing, and duly executed, would have little value if their provisions could be arbitrarily set aside and disregarded by the tribunals. This view of the case disposes of it. As Mr. Reynolds had, by the express agreement

of the plaintiffs, no power whatever to waive performance of the conditions of the policy on behalf of the company, his declaration could not operate as an estoppel against setting up a breach of condition as a defense. Apart from this consideration, which is fatal, it is apparent that the representations of Reynolds were not the assertion of any fact, past or present, but constituted only a promise as to the future. The plaintiffs had no right under the policy to repose any confidence in such a promise, because there was an express exclusion of any authority on the part of Reynolds to make it. We are not prepared to admit that, even if had possessed sufficient authority to bind the company as to this matter, the declarations testified to by the plaintiffs were of such a character as to constitute an estoppel. In their essential feature, they related only to the future action of the company, to wit, payment without suit. As to what he said in regard to there being no necessity to bring suit, it was only the expression of his personal opinion, and not the assertion of a fact. The fifth, sixth, seventh and eighth assignments of error are sustained. The consideration of the remaining assignments is unnecessary.

Judgment reversed.

Orphans' Court.

In Re Estate of SAMUEL M. KIER, Deceased.

S. M. Kier died insolvent. The last portion of his real estate having been sold, the proceeds were sufficient to pay in full the only unpaid judgment which had been entered in his lifetime. The present, which is the third account, embraces these proceeds and also the proceeds of personal estate. At the audit interest was claimed on the above judgment from the date of sale to the date of distribution out of the personal fund as against claims of general creditors.

Held, that the judgment was not entitled to the interest claimed.

Exceptions to adjudications of audit.

Opinion by HAWKINS, P. J. Filed May 13, 1882.

The rule is settled in this court that where real estate is sold for payment of debts, interest or liens, payable thereout, ceases on the confirmation of sales to the extent of the proceeds realized: *Ramsey's Appeal*, 3 W. & S., 71; *Carver's Appeal*, 89 Pa. St., 276. The debt is considered paid to this extent, because the money is in the hands of the officer whose duty it is to pay, and is unproductive and presently available to the creditor. There may be exceptions to the rule, as where the debtor causes unnecessary delay in the distribution, to

the injury of the creditor. But no such equity exists here in favor of the allowance of interest beyond the confirmation of sale. The whole estate passed into the grasp of the law for the purpose of distribution among all the creditors, according to their respective rights, at the death of the debtor. It was insolvent; and whereas, this exceptant's claim by virtue of its prior lien, will be paid in full out of the proceeds of sale of the real estate, the general creditors will receive only a *pro rata* out of the personal estate. In justice the assets ought to be strictly marshalled. The general creditors have, to say the least, been injured as much by the delay in the distribution as this exceptant. They were in no sense the cause of the delay, nor were they under surety obligations to the exceptant.

For creditor, *Messrs. Robb & McClung.*

Contra, S. Schoyer, Jr., Esq.

NEW BOOKS.

THE AMERICAN DECISIONS, containing the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports, to the year 1869. Compiled and annotated by A. C. FREEMAN, Esq., Counselor-at-Law, and author of "Treatise on the Law of Judgments," "Co-Tenancy and Partition," "Executions in Civil Cases," etc. Vols. XXXII and XXXIII. San Francisco: A. L. BANCROFT & Co., Law Book Publishers, Booksellers and Stationers. 1882.

These volumes bring the cases down to 1838-39. The following Pennsylvania cases are published, taken from 7th Watts and 4th Wharton: *Stockton v. Dennith*, *Johnston v. Fessler*, *Hoffman v. Strohecker*, *Clark v. Seirer*, *Hatzfield v. Gulden*, *Withers v. Baird*, *French v. Leely*, *Hepburn v. Curts*, *Moritz v. Garnhart*, *Bennet v. Paine*, *Dorsey v. Dorsey*, *Woods v. Farniere*, *McCulloch v. Hutchinson*, *Richart v. Scott*, *McGee v. Campbell*, *Fleming v. Maine Ins. Co.*, *DeBolle v. Penn'a. Ins. Co.*, *Bellemire v. Bank of the U. S.*, *Burr v. Sim et al.*, *Hand v. Baynes*, *Walker v. Geisse et al.* and *Bevan v. Bank*. There are notes to several of the foregoing cases.

DIGEST OF THE AMERICAN DECISIONS and Index to the notes thereto, with a table of the cases reported in Volume one to thirty inclusive, 1760-1837. Vol. I. By A. C. FREEMAN. San Francisco: A. L. BANCROFT & Co. 1882.

This digest is admirably arranged and will greatly facilitate the use of this very valuable series of reports. The publishers are entitled to great credit for the liberality and good taste displayed in the publication of the several volumes, and the editor will surely have the good will of all lawyers when the character of his work is brought more generally into notice.

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PITTSBURGH, PA., MAY 31, 1882.

Supreme Court, Penn'a.

In Re Estate of G. C. LIGHTCAP, Sr., Deceased.

Appeals of JAMES S. YOUNG, Administrator, etc.,
and of SAMUEL LIGHTCAP et al., Legatees.

Where a decree of the Orphans' Court has been affirmed by the Supreme Court upon appeal, the Orphans' Court has ample power to correct an error in such decree, and for that purpose may entertain a petition of review, either under or independently of the Act of 13th October, 1840.

Parker's Appeal, 11 P. F. Smith, 478; *Gillen's Appeal*, 8 W. N. C., 499, and *Whelan's Appeal*, 20 P. F. Smith, 410, followed.

The filing by executors of a joint account renders the accountants *prima facie* liable jointly; and while the death of one of the accountants at law discharges his liability, in equity the liability survives, if there be equitable circumstances showing that it ought to be continued.

Three executors filed a joint account, showing a balance against them, after which one of the executors died. The assets of the estate at the time of the death of the executor were in the hands of his survivors, had never in fact been in his hands; the survivors were at that time and for years after, solvent, one of them for six years thereafter continuing to transact the business of the estate with the knowledge of the legatees; no *devastavit* had been committed by the deceased executor, and no action was brought against his estate until nine years after his decease. *Held*, affirming the decree of the court below, that the estate of the deceased executor, under such circumstances, should not be surcharged with the balance admitted in the joint account.

Appeal from the decree of the Orphans' Court of Allegheny county.

Gilson C. Lightcap, Sr., died testate in January, 1865. In his will he directed his executors to sell his real estate, invest the proceeds in good securities, expend the interest accruing upon such investment for the support of his wife and children until his youngest child should come of age, when two-thirds of his estate was to be divided among his children, the remaining one-third to be retained for the support of his widow, and upon her death it also was to be divided among his children. The will appointed as executors Samuel L. Robinson, Gilson C. Lightcap, Jr., and S. B. W. Gill, who jointly accepted letters testamentary, sold the real estate and executed joint deeds, taking

purchase money mortgages in their joint names to secure unpaid balances of purchase money. At December Term, 1866, the executors filed a joint account showing a balance in their hands in mortgages uncollected of \$14,018.33, and in cash, \$4,170.37. As the mortgages became due satisfaction was entered on the record by Gill. Robinson died in 1870, and in 1877 Gill absconded and was removed from the trust. In May, 1878, Samuel Lightcap, the youngest child, became of age, when a citation was issued to the administratrix of Robinson to file an account in the Lightcap estate. Robinson, administratrix, filed an account setting forth that nothing had come into her hands and crediting herself with the expense of filing the account. To this account exceptions were filed and a decree was made surcharging Robinson's estate with \$4,170.37 with interest, being the cash balance shown in the joint account filed by Lightcap's executors, but limiting the surcharge to the personal estate of Robinson, deceased. To this decree the heirs of Lightcap, deceased, filed exceptions, assigning as error the refusal of the court below to surcharge the estate of Robinson with the money collected by Gill upon the purchase money mortgages, and the limiting of the surcharge made to the personal estate of Robinson. The Supreme Court held that the question as to whether the amount decreed against the accountant was or was not a lien against the real estate of Robinson, was not before the court below at the time of the making of the decree, and with that modification affirmed the decree. James S. Young, administrator *d. b. n. c. t. a.* of the Lightcap estate, then presented a petition to the Orphans' Court, praying for a writ of *fiery facias* with which to levy out of the lands of Robinson's estate the sum decreed against it.

While the petition for the writ of *fiery facias* was pending, Robinson's administratrix filed a petition for a bill of review, setting forth that Robinson was an executor only *pro forma*, that neither he nor the petitioner even received any part whatever of the assets of the Lightcap estate, but that the same were in the possession and control of Gill, who converted them to his own use; that the decree surcharging Robinson's estate would be found to be unjust and inequitable, and asking that that decree be reviewed, reversed and set aside and a decree made in favor of petitioner for the cost of filing the account. To this petition an answer was filed, denying all material facts and also setting forth the affirmance of the decree by the Supreme Court.

The Court below (HAWKINS, P. J.), then vacated and set aside the decree surcharging Rob-

inson's estate with the balance admitted by the joint accountant of Lightcap's executors, dismissed the exceptions filed to the account of Robinson's administratrix and dismissed the petition of James S. Young, administrator, etc., praying for a *feri facias*.

This action of the court was assigned as error.

The facts as found by the court below, and the authorities relied on, are sufficiently indicated in the following opinion.

For appellants, *Messrs. Lewis McMullen and J. T. Myler*.

Contra, George Shiras, Jr., Esq.

Opinion by GREEN, J. Filed January 9, 1882.

When this case was here before the question involved in the present contention was not before us. It follows that the decision there made determined nothing as to the matter now in controversy. It cannot be doubted that the court below had ample power to correct the error of its original decree, either under or independently of the Act of 13th October, 1840. Nothing had been done under the decree, and if it was erroneous it ought to be corrected in the interest of justice and by the court that made it. We held in *Parker's Appeal*, 11 P. F. Smith, 478, that the Orphans' Court under the Act of October 13, 1840, might entertain a bill of review, notwithstanding a decree of affirmance by the Supreme Court. The discretionary power of the Orphans' Court to correct its own errors by petition of review, outside of the provisions of the Act of 1840, has been affirmed in the cases of *Gillen's Appeal*, 8 W. N. C., 499, and *Whelan's Appeal*, 20 P. F. Smith, 410, and is manifest upon plain principles applicable to the power of all courts over their own decrees.

The chief contention here is upon the question of the propriety of the original decree of surcharge. The learned judge of the court below, in a carefully prepared opinion, has indicated with much force the reasons which induced him to regard that decree as erroneous. He has expressly found upon the evidence taken in the course of the proceedings upon the account, that no *devastavit* was committed until long after the death of Robinson, the deceased accountant. It is very clear that upon Robinson's death the right to the control and disposition of the assets of Lightcap's estate devolved upon and resided in the surviving executors, and they were responsible for its exercise. As the testimony taken in the court below has not been printed, we are bound to assume that all the facts found by the Orphans' Court, and reported in the opinion, were found upon sufficient testimony. As set forth in the opinion they are, that Robin-

son never had any of the assets of the real estate of Lightcap in his hands up to the time of his death; that all the assets of the estate in point of fact were, where the law had cast them, in the hands of the surviving executors after Robinson's death, and that those executors were solvent; that there is no evidence tending to show that any *devastavit* had occurred prior to Robinson's death, and that neither Mr. Robinson nor any of the legatees had any ground of suspicion that such *devastavit* had taken place; that at the time of Robinson's death, Gill, the executor, who had and administered the assets, was entirely responsible and able to settle his accounts or to give security, had it been required and continued in that condition for several years later; that Gill continued for more than six years after Robinson's death to transact all the business and handle all the assets of the estate, as acting trustee, with the knowledge and without objection on the part of the legatees. No proceedings were instituted against Robinson's estate until more than nine years after his death, and this is, as the learned judge of the Orphans' Court well says, strongly persuasive evidence that the legatees looked to Gill alone as the responsible trustee.

In this state of the facts it is contended that the estate of Robinson is liable as for a *devastavit*, mainly because he had joined in the original account filed by the three executors in which they admitted a balance in their hands. Ordinarily it is quite true that the filing of a joint account is an admission of joint liability for the balance in hand. But it by no means follows that such joint liability is a continuing obligation which remains fixed and established as a judicial decree and without regard to subsequent circumstances. *Hengel's Appeal*, 12 Harris, 413, chiefly relied upon by the learned counsel for the appellants, furnishes both the rule and its exception. It was there held that the filing of a joint account renders the accountants *prima facie* liable jointly for the acknowledged balance, but the death of one of the accountants at law discharged his liability. In equity, however, the liability survived, if there were equitable circumstances showing that it ought to be continued. Thus if the deceased accountant had actually received the money, or the survivor was insolvent, and the deceased had made no effort during a number of years to secure the fund received by the insolvent executor, in such circumstances the liability would survive and could be enforced against the estate of the deceased, solvent, joint accountant. But that liability was shown to depend, not upon the mere fact of the filing of the joint account,

but upon that fact combined with the equitable circumstances stated. Now, in the present case, there is an entire absence of these circumstances. Robinson never received any of the assets of the estate, and Gill, who did receive them, was not only not insolvent during Robinson's lifetime, but continued entirely solvent for a number of years after his death, as he had been before. There was, therefore, no neglect on Robinson's part in not securing the fund in Gill's hands, before his death. It is also contended that the omission of the executors to invest the fund as directed by the will constituted a *devastavit* as to Robinson during his life. The authority cited for this is *Weigand's Appeal*, 4 Casey, 473. That, however, was a case in which the proceeding was against the surviving executor against whom of course the obligation to execute the will was a continuing one for the neglect of which he was undoubtedly liable. No case is cited, either from the English or American Reports, in which a liability has been declared and enforced in circumstances such as are present here, and the tendency of modern cases is certainly to hold accountants responsible for their personal defaults, and for such as have resulted from personal negligence, but not for the mere defaults of others with whom they have been joined, unless there are special equitable circumstances requiring it. For these reasons we think the action of the court below, in setting aside the original decree of surcharge, was right, and therefore *The decree is affirmed.*

JAMES L. ORR, Defendant Below, v. VICTORIA A. SEILER.

Where one accused of crime has been discharged by the examining magistrate, the burden of proving probable cause is thrown on the prosecutor, in an action against him for malicious prosecution.

Malice is of two kinds: malice in law and malice in fact; the latter, *malus animus*, directing the party from improper motives to do a wrong intentionally, and the jury have a right to assess damages by way of punishment on a defendant for a wanton and reckless use of criminal process for the purpose of intimidation or to compel the payment of money, or the restoration of property alleged to have been stolen.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

The husband of Victoria A. Seiler, a liquor merchant and lessee of premises from W. H. Gerdes, died, leaving his wife in possession. Mrs. Seiler, as administratrix of her husband's estate, advertised the personal property upon the premises leased and sold the same to one Roehring. There were upon the premises at the time of the sale a partition dividing two rooms on the first floor, which belonged to

Gerdes, and three signs, two of which were small box signs, the third a sign placed upon the roof of the building, about four feet in height and running almost the whole length of the front part of the roof. The third sign was advertised in the notice of sale, but was not actually sold, as it belonged to Gerdes, and was also visible to persons passing on the opposite side of the street from that on which the premises leased were situated. The partition after the sale was taken down to permit Roehring to remove a large ice box or refrigerator, and was carried away by mistake with other articles, as is alleged by plaintiff below, and without his knowledge or consent. Orr, the defendant below, was the agent of Gerdes, and upon one occasion Gerdes told Orr that the partition and sign had been removed. Orr visited the premises, looked through the window, saw the partition removed, looked toward the roof and failed to see the sign, and made information against Mrs. Seiler for larceny. Mrs. Seiler was never actually in custody, but appeared before the alderman and gave bail, and after two hearings was discharged, and upon that brought this action against Orr for malicious prosecution.

The assignments of error were upon the answers of the court to the following points of the plaintiff and defendant:

The plaintiff below requested the court to charge: "That where one accused of crime has been discharged by the examining magistrate, the burden of proving probable cause is thrown on the prosecutor in an action against him for malicious prosecution." Affirmed.

"That malice is of two kinds: malice in law and malice in fact. That by the former is understood to be ill-will; the latter, *malus animus*, directing the party from improper motives to do a wrong act intentionally towards the plaintiff." Affirmed.

"That in estimating the damages, if the jury should find for the plaintiff, they are not confined simply to the actual damage, if any, sustained by the plaintiff, but have the right to take into consideration all the circumstances of aggravation attending the case, and to assess the damages by way of punishment on the defendant for their wanton and reckless use of criminal process for the purpose of intimidation or to compel the payment of money, or the restoration of property alleged to have been stolen." Affirmed.

The defendant below requested the court to charge: "That if the jury believe that the defendant, Gerdes, was informed by Roehring that Mrs. Seiler had sold to him, Roehring, the sign and partition, and that he had possession

of the partition; and Gerdes, believing this, communicated it to the defendant, Orr; and Orr, acting on this information, and after inspecting the premises, was of the belief that the sign and partition were both taken away, and being of the honest belief that Mrs. Seiler, the tenant, had disposed of them to Roehring, he had probable cause of making the information." Refused.

"That there is no special damage alleged or proved in the case, and no such conduct on the part of either defendant as would justify a verdict for more than compensatory damages." Refused.

For plaintiff in error, defendant below, *C. C. Dickey, Esq.*

Contra, Messrs. C. S. Fetterman and S. A. Johnston.

PER CURIAM. Filed November 14, 1881.

We find no error in the answers of the learned court to the points presented. There was nothing in the information given to Gerdes and communicated by him to Orr, which made probable cause for the latter to institute a prosecution for larceny. As it appears that the proceeding was a wanton and reckless one, and especially if the design was to get back property alleged to have been wrongfully taken, which if it was true could only be remedied by a civil action, there was no error in the instruction to the jury on the subject of damages.

Judgment affirmed.

WAGONER'S APPEAL.

W. had an interest in property sold by sheriff's sale under articles of agreement and payment of purchase money, having no deed. At the time of the sale the liens against it were a judgment held by W.'s wife, and a mortgage held by T. Mrs. W. purchased at the sale, and her judgment absorbed the whole fund, which the court awarded to her, reversing the court below. Before the sale and before T. became the owner of the mortgage, the liens were a judgment held by T., another by Mrs. W. and a third by T.; but, in pursuance of an arrangement with W., the mortgage was made to T., and he satisfied the first of his judgments, and transferred the other to Mrs. W. It was held (reversing the court below), that the arrangement could not be rescinded, upon the ground that T. was deceived as to the title, and misled by Mrs. W.'s silence.

Appeal from the decree of the Court of Common Pleas of Perry county.

Opinion by PAXSON, J. Filed October 3, 1881.

Isabella Wagoner, one of the appellants, was the purchaser at the sheriff's sale of the real estate of her husband, the proceeds of which is the subject of the present contention. The price she paid was \$710. At the time of the sale she held a judgment against her husband for the

sum of \$723.69. As the record stood, this judgment was the first lien on the real estate sold, and was sufficient to absorb the entire fund. The auditor awarded the fund to Mrs. Wagoner's judgment, No. 148 January Term, 1877. The learned court, upon exceptions, reversed the auditor, and gave a portion of the fund to the holder of a subsequent mortgage not reached by the sale. In order to accomplish this the court struck off the satisfaction of a judgment which before the sale had stood upon the record as a prior lien to Mrs. Wagoner's judgment, but which, at the time of the sale, was satisfied of record. The court also declared null and void the assignment to Mrs. Wagoner of the Charles Troutman judgment, No. 6 of April Term, 1877, which judgment at the time of the sale was the second lien. The circumstances which induced this action of the court below are substantially as follows:

David Wagoner (appellant) had an interest in what was known as the "Cummins' property," which he held by virtue of articles of agreement and payment of the purchase money, having no deed therefor. The liens against the property were: 1. Jacob Wagoner's judgment for \$330, assigned to Charles Troutman; 2. Isabella Wagoner's judgment for \$723.64; and 3. Charles Troutman's judgment for \$230.47. It will be seen that Troutman was the holder of liens Nos. 1 and 3. It appears that he was in doubt whether the title to the real estate was vested in Wagoner or in his wife. Probably believing the title to be in Mrs. Wagoner, in which case his judgments against her husband would not be liens, he agreed with the latter that if he and his wife would execute a mortgage to him, Troutman, for the amount of the two judgments he held against Wagoner, with a little bonus added, as we gather from the statement of facts by the court, he, Troutman, would satisfy the first of the said judgments and assign the other to Mrs. Wagoner. This was done, and the record so stood at the time of the sheriff's sale. The mortgage so given having proved to be worthless, *i. e.*, not reached by the sale, the learned court rescinded the arrangement, upon the ground that Troutman was deceived in regard to the title. He believed it to have been in Mrs. Wagoner, whereas, it was in her husband. There was no charge of fraud against Mrs. Wagoner. She never claimed to hold the title, but the learned court was of opinion that Troutman was misled by her silence; that she might have spoken, but did not, and suffered Troutman to remain under the impression she was the owner, and by this means obtained the satisfaction of one judgment and the transfer of another which

were valid liens against her husband's real estate, giving therefor a worthless mortgage.

We are not called upon to consider the cases cited as to the effect of silence when it is a duty to speak. They have no application. Mrs. Wagoner was under no such duty, so far as this record shows. Troutman made no inquiry of her in regard to the title. We have nothing to show, she even knew he was under the belief she held the title. The transaction was between Troutman and her husband. The former got just what he bargained for, viz., a mortgage which bound the property whether the title was in the husband or the wife. He evidently thought the title was in the wife, in which case his two judgments against the husband were worthless. He may have thought he was making a thrifty bargain with Mrs. Wagoner in exchanging his judgments for a mortgage, which, though a subsequent lien, bound, as he thought, the property. All that can be said about the matter is, that in attempting to get an advantage over Mrs. Wagoner Troutman over-reached himself. This would not entitle him to the extraordinary relief accorded him by the court below. Aside from this, the money must be distributed to the liens as they stood at the time of the sheriff's sale. Mrs. Wagoner bought the property upon the faith that her judgment was a first lien. *Non constat*, that she would have purchased it at all had she known she was not entitled to have her bid applied upon her judgment.

The decree is reversed at the costs of the appellee, and distribution ordered in accordance with this opinion.

For appellee, Messrs. Sponsler & Potter.

BRENNER, TRUCKS & CO. v. MOYER.

The plaintiff sued the defendants in *assumpsit*, by summons, and subsequently recovered judgment. Simultaneously with the first suit he issued an attachment under the Act of 17th of March, 1869, against the same defendants for the same cause of action. The defendants appeared and gave bond with sureties, and the cause came on for trial.

Held, that the judgment which had been recovered in the suit by summons was a bar to a recovery in the attachment suit.

Error to the Court of Common Pleas of Clinton county.

Opinion by GREEN, J. Filed October 3, 1881.

On April 30, 1874, the plaintiff below issued a summons in *assumpsit* against the defendants, and on the same day filed a *narr.* and an affidavit of claim, alleging his cause of action to be an indebtedness due by the defendants to him in the sum of \$1,303.19 for making and deliver-

ing 13,506 cubic feet of square timber. The *narr.* contained only the common counts, but subsequently an amended *narr.* was filed, declaring on a special contract in writing, for making and delivering square timber, the quantity delivered and the price therefor being the same as set forth in the affidavit of claim.

The pleas of *non assumpsit*, payment and set-off being filed, the cause was tried on December 21, 1876, and a verdict was recovered for the full amount of the claim and interest, for which judgment was entered on December 28, 1876. This suit was No. 305 May Term, 1874.

On the same 30th day of April, 1874, upon which the summons in the above case was issued, the same plaintiff issued an attachment under the Act of 17th of March, 1869, against the same defendants, claiming the same indebtedness which constituted the cause of action in the previous suit. This proceeding was No. 306 May Term, 1874. The affidavit and bond required by the act were filed, together with a *precipe* for a writ of attachment, directing the sheriff to attach two rafts of timber, the property of the defendants. A writ of attachment was issued, served and returned, all on the same 30th day of April, and the rafts attached were delivered to the defendants, from whom, with sureties, a bond was taken for the surrender of the rafts, in the event of a recovery in the said attachment suit, No. 306 of May Term, 1874. On December 20, 1878, a *narr.* was filed, declaring on the same written contract, which was set out in the amended *narr.* in the case No. 305, and also on the common counts, and alleging in addition thereto that the defendants were about to remove their property out of the jurisdiction of the court with intent to defraud their creditors. The cause subsequently went to issue on the pleas of *non assumpsit*, payment with leave, etc., and a denial that the defendants were about to remove their property. On the trial the record of the judgment in the case No. 305 was given in evidence, and the court was asked, amongst other things, to charge that this judgment was a bar to a recovery in the present suit. This the court declined to do, and that refusal is assigned, *inter alia*, for error here. We are of opinion that the learned court below erred in thus ruling, and that the judgment must be reversed for that reason. We would have been very willing to sustain the judgment if we could do so, especially as we are informed that a practice prevails in some portions of the State to proceed in this class of cases in the same manner as was done here; and doubtless the learned counsel for the plaintiff followed the practice usual in his vicinity.

But we are quite clear that this method is erroneous, upon very familiar legal principles which cannot be overlooked.

It is without question that the cause of action in these two proceedings is the same. Considered as personal actions between the same parties, it is manifest that a recovery in the first worked an extinguishment of the right to recover in the second. We said in *Wilson v. Wilson's Administrator*, 9 S. & R., 429, that "to permit a party to recover in a second action what was included in, and might have been recovered in the first action, would be against the policy of the law and unjust, because it would harass a defendant and expose him to double costs." And in *Marsh v. Pier*, 4 Rawle, 289, it was held that "a judgment of a proper court being the sentence of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case." In *Duffy and Mehaffy v. Lytle*, 5 W., 132, KENNEDY, J., said, that "the first judgment when given, whether it be in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher order."

These principles, which are very familiar, dispose of the question at issue, if in fact as well as in law, the two proceedings are for the same identical cause of action, and if the first judgment really determines every essential element involved in the second action. It is argued, however, and not without force, that the two proceedings are not essentially the same; that the first action is founded upon and results in a judgment for the mere personal liability of the defendant, while the second is a special proceeding against particular personal property only of the defendant. If this were strictly so there would be much weight in the argument. An examination, however, of the Act of 1869 develops that the view thus presented is not a correct interpretation of its provisions.

The first section authorizes the issuing of a writ of attachment in any *pending action*, because it provides that it may issue against any *defendant* upon the application of any *plaintiff*, upon filing the necessary proof and bond. It is therefore in aid of an action which has already been commenced, and in case no such action is pending, may be issued in the first instance. But in either event, under the third and fourth sections of the act, it becomes an ordinary personal action, if either there is a personal service of the writ, or if the defendant is a resident of the county, or appears to the action. In this case the defendant appeared and made a defense

after a bond was given to the sheriff for the return of the rafts in the event of recovery.

From that time it is entirely clear that the proceeding became and was a mere personal action against the defendants, with a right to bring an action on the bond taken by the sheriff, if the rafts were not returned according to the condition of the bond. If they were surrendered there would be of course a right to have process of execution levied upon them, as upon any other property of the defendants. These being the characteristics of the proceeding, it is entirely clear that, independently of authority, it must be regarded in the circumstances of the present case as a mere personal action, and hence subject to be barred by the recovery of a judgment in a personal action previously brought for the same cause. We consider, moreover, that the question has been practically settled by previous decisions of this court.

In *Barley v. Linah*, 4 Harris, 241, we held that a judgment in a sister State is to be deemed to have the effect of a domestic judgment in relation to the cause of action; and where the defendant had notice it is conclusive of the subject-matter, and the original cause of action is merged in it; therefore, a suit pending in the State of Maryland, and a judgment subsequently obtained therein, is a bar to a proceeding between the same parties and for the same cause of action by foreign attachment instituted in Pennsylvania after the bringing of the suit and before judgment therein. On page 250, CHAMBERS, J., said: "It is settled that where a judgment has been already obtained in a prior action by the plaintiff against the defendant, for the identical demand, contract or obligation, it is merged by the superiority of the record security acquired by the judgment; *transit in rem judicatam*, and the creditor can no longer prosecute suit upon the original demand, though it were a specialty." In *Byler v. Kline*, 14 P. F. Smith, 130, it was expressly ruled that a judgment in a foreign attachment case where the attachment is dissolved, or is contested without dissolution, has the like force and effect as in case of an action commenced by a summons. See also the case of *Garvin v. Dawson*, 13 S. & R., and the authorities there cited.

We are of opinion that the judgment in the case 395 May Term, 1874, being for the same cause of action, in a suit between the same parties, extinguished the cause of action in the present case, and hence constituted a good bar to any recovery in the latter suit, and therefore

The judgment is reversed

For plaintiffs in error, Messrs. P. S. Merrill and C. G. Furst.

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PITTSBURGH, PA., JUNE 7, 1882.

Supreme Court, Penn'a.

PHILADELPHIA AND READING RAILROAD COMPANY'S APPEAL.

A private or trading corporation has power to borrow money and issue its notes, bonds or other evidences of indebtedness, unless restrained by its charter or the law of the land.

Where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious.

The bonds in question in this case are not deferred stock in form or substance. The holders would have no rights as stockholders.

Trading corporations have power to make perpetual loans. Borrowing is not the exercise of a corporate franchise, where, if the right is not expressly given, it is denied.

Appeal of the Philadelphia and Reading Railroad Company from the decree of the Court of Common Pleas of Berks county.

The following is the form of the proposed bonds in this case:

"PHILADELPHIA AND READING RAILROAD COMPANY.

"Deferred Income Bonds.

"Total Issue, \$34,300,000.

"This is to certify, That.....of.....entitled to.....dollars of the Deferred Income Bonds of the Philadelphia and Reading Railroad Company. Transferable only upon the books of the said company in person, or by attorney duly authorized according to the rules established for that purpose, and on surrender of this certificate.

"This certificate is one of an issue of \$34,300,000, all of which issue are irredeemable and are entitled to interest up to six per cent., only after a dividend of six per cent. in each year shall have been paid on the common shares of the said company, and thereafter the right of this issue of Deferred Income Bonds to further interest shall rank *pari passu* with the declaration of further dividends upon the common shares of the said company.

"Witness the seal of the corporation and the signatures of the president and treasurer, at Philadelphia; this.....day of....., A. D....."

For appellants, *George F. Baer, Esq.*

Contra, Messrs. Isaac Hiester and James E. Gowen.

Opinion by PAXSON, J. Filed March 6, 1882.

We are in no doubt as to the power of the Philadelphia and Reading Railroad Company to issue the "deferred income bonds" described in this bill. So far as the mere borrowing of money is concerned it is not necessary to look

into the charter of the company for a grant of express powers. It exists by necessary implication. As a general proposition the right of private or trading corporations to issue promissory notes, bonds or other evidences of indebtedness, unless restrained by their charters or the law of the land, may be conceded. The reason is plain. Such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing of obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect: *City of Williamsport v. The Commonwealth*, 3 Norris, 487; see also *Reinboth v. Pittsburgh*, 5 Wright, 278; *Watt's Appeal*, 28 P. F. Smith, 370. I will not pursue the subject further; it would be a waste of time.

There being no objection therefore on the ground of want of power, is there anything in the form of the transaction to render it *ultra vires*? We learn from the pleadings that in May, 1880, the company failed and passed into the hands of receivers; that at the time of such failure it had a floating or unfunded debt of upwards of \$10,000,000; that a large amount of property, mainly stocks and bonds of great value had been pledged to secure said debt; and that said stocks and bonds were subject to the risk of being sold at forced sales at a great sacrifice; that the president and managers of the company, in order to pay this floating debt, and thereby regain possession of the collaterals, determined to ask the stockholders to contribute \$10,000,000 for such purpose, for which they proposed to give them \$34,300,000 of deferred income bonds on which interest is to be deferred to a dividend of six per cent. on the common stock of the company, and thereafter to take all revenues up to six per cent., and then to rank *pari passu* with the common shares for further dividend.

It will thus be seen that the stockholder who advances \$15 receives a bond for \$50, which is irredeemable, and which is not entitled to interest until after six per cent. has been paid upon the common stock.

The objections that have been made to this scheme are twofold: First, that it is usurious; and second, that the transaction is not a borrowing of money, but the issuing of a deferred stock, which is beyond the power of the company.

It is sufficient to say in regard to the first objection that as the interest on the "deferred income bonds" is payable only upon a contingency, the contract is not usurious. *Non constat* that the company will ever pay anything to this class of bondholders. The contingency

which will entitle them to interest may never arise, and is reasonably certain to be postponed for a considerable period. There is, therefore, no contract for the payment of more than legal interest. It is settled law that where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious: *Spain v. Hamilton, Administrator*, 1 Wallace, 604; *Lloyd v. Scott*, 4 Peters, 205. This point does not need elaboration.

The second objection is equally without merit. The bonds in question are not deferred stock either in form or substance. They are certificates of indebtedness under the seal of the company, with a recital that they are irredeemable; that they are entitled to no interest until after the common stock has received six per cent., and after that to come in *pari passu* with said common stock. They more nearly resemble a perpetual loan, with the interest indefinitely postponed. The holders would certainly have no rights as stockholders.

It is urged, however, that this transaction is not a borrowing of money within the implied powers of the company; that the meaning of the word "borrow" as applied to moneyed transactions involves an obligation to return the sum or thing borrowed. This is a narrow view of the subject. It is true we often use this word in the sense of returning the thing borrowed in specie, as to borrow a horse. But it is not limited to this sense.

Among the definitions given by Webster are the following: First, "to take or receive from another on trust, with the intention of returning or giving an equivalent therefor;" and, second, "to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume." We need not give the apt illustrations with which the learned lexicographer adorns his text. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time, it is not always nor necessarily so. The object of loaning money is to obtain a return in the shape of interest. The interest is the consideration for the loan, the hire or price which is paid for the use of it. If I agree to pay \$60 for the use of \$1,000 for one year, it is a borrowing of money. It is equally so if I contract at the same rate for the use of it for ten years. Is it any the less so when the contract is perpetual and the loan irredeemable? The equivalent is paid annually in the shape of interest.

We do not think trading corporations any more than individuals are restricted in their moneyed transactions to the narrow meaning

of the word "borrow." In its broader sense it implies a contract for the use of money. The terms of the contract are within the control of the contracting parties so long as they keep within the law. I see no legal objection to a contract for a perpetual loan. Such contract implies the voluntary advance of a sum of money, repayment of which is not to be demanded, presumably for some benefit or advantage to the lender. Such transactions are common in England, and are not unknown in this country. They are referred to in *Union Canal Co. v. Antillo*, 4 W. & S., 556, and in the *Appeal of the Zoological Society*, 38 *Legal Intell.*, 403, and I am informed that the annuity bonds of the Lehigh Valley Railroad Company are irredeemable. So long as the company pays the interest the principal is not demandable. If the Reading Railroad Company may not accept money from its stockholders as a perpetual loan, I am unable to see how it could accept it as a gift.

It is to be observed that the borrowing of money is not the exercise of a corporate franchise, or a power that is denied to the citizen. Where a corporation seeks to exercise its franchises, as when it attempts to take private property for public use by virtue of the Commonwealth's right of eminent domain, we have a case in which if the right is not expressly given it is denied.

We have the question remaining whether the contract should be enforced in this proceeding. The bill was filed by a stockholder of the Philadelphia and Reading Railroad Company, setting forth the failure of the company, the existence of the large floating debt referred to, and that in order to pay this floating debt, the president and managers "determined to ask the stockholders to contribute a sum sufficient for such purpose in consideration of the company agreeing to pay yearly a certain percentage on the sum advanced, in case the surplus earnings, after paying interest on debt and six per cent. dividends on stock, should be sufficient for the purpose."

The bill then set forth the details of what is referred to as the "deferred bond scheme;" that bonds to the amount of \$19,655,000 have been subscribed for by the shareholders, and the residue by the bondholders of the company; that a sum exceeding \$1,850,000 has been paid to the receivers on account of said subscription; that the stockholders of the company, by the vote of a large majority, have approved of the plan; that the complainant, who is the holder of a thousand shares of the stock, subscribed for and bound himself to take and pay for his quota of

said stock, viz., bonds to the amount of \$50,000, but that the company has failed and refused to perform its part and issue said bonds, although the plaintiff tendered full and complete performance on his part of the contract. The prayer of the bill is for specific performance.

The company demurred to the bill upon the single ground that the plaintiff had not by said bill shown that said company had a legal right to execute and issue the bonds referred to, and further elected to abide by its demurrer.

As a general rule, a court of equity will not enforce specifically a contract relating to personalty. The reason is that for the breach of such contract an action at law furnishes an adequate remedy: *McGowin v. Remington*, 2 Jones; *Foll's Appeal*, 10 Norris, 434; *Appeal of the Zoological Society*, 38 *Legal Intell.*, 403.

We need not discuss the question how far an action at law would be an adequate remedy for a breach of this contract, nor to what extent the plaintiff would be injured by the refusal of an insolvent corporation to accept his money. The case presents other questions of higher importance.

If this were in point of fact an adverse proceeding, and the defendant company were resisting the enforcement of this contract, we would hesitate to make a decree. But the proceeding, whatever may be its form, is evidently an amicable one for the purpose of settling the legal rights of the parties.

In this respect it closely resembles an amicable action with a case stated. The demurrer admits all the facts alleged in the bill, and suggests only the supposed illegality of the "deferred bond scheme," with a declaration of submission to the ruling of the court. That the plain object of the proceeding is to obtain the decree of this court upon the validity of the bonds is not an objection, in view of the fact that the case is a *bona fide* one, with real parties having an actual present interest. And we can see substantial reasons why this question should be put at rest by the decision of a court whose decree shall be final. The property of the Reading Railroad Company is of enormous value, and its development enters largely into the business and prosperity of the city of Philadelphia and State, at large. Unless some relief can be speedily afforded, by which its large unfunded debt can be liquidated, the interests of stockholders and, to some extent, of bondholders, must be sacrificed. The ruin of such a property would be a public calamity, the extent of which is difficult to measure. The "deferred bond scheme" was intended to meet this difficulty. We have nothing to do with its wisdom. That

is a matter which concerns only those whose interests are to be affected by it.

It is enough for us to know that it comes to us with the approval of the president, the board of managers, and a large majority of the stockholders of the company. As we are unable to see that it conflicts with any rule of law or public policy, we will not be astute to find reasons for refusing a decree, particularly as no question has been raised as to the jurisdiction. And even if there had been, the Act of Assembly which expressly confers upon courts of equity the supervision and control of corporations would be ample.

If, as the bill avers and the demurrer admits, the stock and bondholders of this company are willing to advance the sum of \$10,000,000 to save their valuable property from ruin, we see no sufficient reason why they should not be permitted to do so. It would not be difficult to demonstrate that it might be their interest to make such advance, even if the money were donated. That they have reserved the chance of getting some of it back in the future in the shape of interest does not detract from the legality of the scheme.

Decree affirmed and appeal dismissed at the costs of the appellants.

Dissenting opinion by MERCUR, J.

I am constrained to dissent from the judgment of the majority of this court. I consider it fraught with mischief reaching far beyond this particular case. It not only affirms the existence of a power not found in its charter, but one in clear conflict with the general law of the Commonwealth.

A corporation is the mere creature of the law. It cannot exercise any powers other than those expressly conferred or necessarily implied in furtherance of the object of its creation. All powers not so given are withheld. It is not sufficient that the officers or a majority of the stockholders of a private corporation believe its interests may be advanced by the exercise of additional powers. What the Commonwealth has not given to it can only be obtained by virtue of legislative action. Power manifestly doubtful should never be recognized by judicial construction. If not given by plain words or by necessary implication, we should declare it not to exist: *Bank of Pennsylvania v. Commonwealth*, 7 Harris, 144; *Penn'a Railroad Co. v. Canal Commissioners*, 9 Harris, 9; *Commonwealth v. Franklin Canal Co.*, Id., 117; *Same v. Erie & Northeast Railroad Co.*, 3 Casey, 339; *Spahr v. Farmers' Bank*, 13 Norris, 432.

Whether this be simply a scheme to create

and sell the "deferred income bonds" described in the bill, or whether, as seems to be the fact, it be a device to borrow money from partial friends at an exorbitant rate of interest, a court of equity should not lend its aid in furtherance of either object. No specific power to create and dispose of such bonds is found in the charter. It is contended that it arises under an implied power to borrow money; that the whole scheme is made lawful under this implied power. The claim here, however, does not stop with the assertion of a power to borrow money at a legal rate of interest. It is blended with the enforcement of an agreement that for each fifteen dollars borrowed the corporation shall pay interest on fifty dollars; in other words, shall pay twenty per cent. interest on all money so borrowed.

This is the specific contract which we are called on to enforce. Not that the company may voluntarily pay this usurious interest, but by decree of this court shall pay it. It is intimated, however, that the company will probably never be able to pay this interest, and this decree will be harmless. Such intimation rests on some assumed principle of equity that I am free to confess I do not understand. If the scheme be so uncertain of ever yielding any return, it is one of gambling, to which the hand of a chancellor should never be extended.

The attempt is gravely made to maintain the agreement of the company by asserting that a corporation, like a natural person, may carry on its legitimate business by all legal and necessary means not prohibited by law or its charter. We may concede all this, yet the question before us is whether it may inaugurate business not legitimate, and carry it on by illegal means prohibited by law and by its charter. Can it truthfully be said the charter ever contemplated that the corporation should agree to pay twenty per cent. interest to such of its stockholders as see proper to lend it money, and then arrange with a person with whom this agreement was made to procure a decree enforcing specific performance of the contract?

In case of a private partnership composed of many persons, if a majority of them should agree to borrow money for the purpose of carrying on the business of the firm, and to pay twenty per cent. interest therefor, it would not for a moment be contended that one lending the money could, either at law or in equity, compel the firm to pay that usurious interest. The attempt here is not to give to a corporation powers equal to those of natural persons to make a binding contract, but much greater powers. The restrictions heretofore recognized as applicable to the powers of a private corporation are

to be disregarded by the affirmance of this decree. I therefore dissent.

GORDON and STERRETT, JJ., concur in this opinion.



WILLIAM BEILSTEIN, for use, Plaintiff Below,
v. MICHAEL SIMON.

JACOB VETTER'S APPEAL.

Rent may issue, not only from lands and tenements corporeal, but also from the personal property necessary for their proper enjoyment.

Mickle v. Miles, 7 Casey, 20, sustained.

A landlord having asserted title in himself to goods seized upon the premises leased, and sold by a judgment creditor, cannot recover the proceeds arising from the sale of such goods upon a claim for rent.

Appeal from the decree of the Court of Common Pleas, No. 1, of Allegheny county.

Jacob Vetter obtained judgment against Michael Simon and issued execution thereon. The sheriff by virtue of this execution levied upon a large amount of personal property used by and in the actual possession of the defendant, Simon.

George Reineman then served a written notice on the sheriff, claiming all the personal property levied on, and the sheriff having received a bond of indemnity sold the property and brought into court the proceeds of the sale for distribution, viz., \$1,160.28.

An auditor having been appointed to make distribution, Reineman appeared before him and claimed the fund for rent.

The auditor found that the defendant, Simon, in January, 1877, leased from George Reineman a planing mill and sash factory, with the machinery, steam power, patterns, fixtures and also the use of three horses and three wagons for the sum of \$2,500 per annum, payable quarterly, and all taxes assessed upon the property leased, and that the lease contained a provision for the payment of taxes for the years following if the lease should be extended. That at the same date another lease was executed between the same parties whereby Reineman let to Simon two houses and a carpenter-shop for the sum of \$250 per annum, payable quarterly, this lease containing the same provision for the payment of taxes as the former.

That Reineman at the time of the making of the lease, and at the time of the levy and sale by the sheriff, was the owner of all of the personal property in and about the planing mill.

That Simon took possession and was in possession at the time the levy was made by the sheriff in February, 1880.

That the sheriff levied upon all the personal

property upon the premises described in the two leases, and after levy made, Reineman by notice in writing to the sheriff claimed the personal property levied on.

That at the time of the levy by the sheriff there was due and in arrear rent arising from the premises described in the leases amounting to \$2,533.27, and that Reineman had given notice to the sheriff of this claim before any of the proceeds of sale had been distributed.

The auditor further reported that the claim for rent was resisted by the execution creditor on the ground (1) that as the lease of the plain- ing mill included certain personal property, and there being no apportionment of the rent, that is to say, the lease not specifying how much of what is called rent was to be paid for the chattels, and how much for the realty, there could be no distress for the non-payment of the rent, and hence it was not demandable out of the proceeds of a sheriff's sale, and (2) that as the claimant, Reineman, asserted title to the property sold by giving the sheriff notice to that effect, before the sale of the same, he was concluded thereby and could have no claim on the proceeds for rent. The auditor overruled both of these objections and awarded the fund to Reineman.

Exceptions were filed to the auditor's report, the exceptions being substantially the same as set forth in the report with the additional objection that the relation of landlord and tenant did not exist between Reineman and Simon at the date of execution, levy and sale. These exceptions were overruled by the auditor and his report was filed.

Vetter renewed the exceptions filed before the auditor in the court below, and the exceptions having been overruled and the report confirmed absolutely, took this appeal.

For appellant, *Messrs. H. C. Bowers and A. Blakely.*

Contra, Messrs. Kennedy & Doty.

Opinion by GORDON, J. Filed November 7, 1881.

As the leases of Reineman to Michael Simon expressly provided for their extension beyond the term of one year, if the lessor should consent thereto, the exception of the appellant founded on a supposed want of such consent, comes to nothing. Simon continued to occupy the premises, and as Reineman did not dissent to such occupancy, his assent must be presumed. Certainly that was a matter for themselves to settle, and if they were satisfied with the arrangement no third party can be heard to complain.

So that rent may issue, not only from lands and tenements corporeal, but also from the personal property necessary for their proper enjoyment, is settled by the case of *Mickle v. Miles*, 7 Casey, 20; and indeed a proposition so obvious ought never to have been doubted.

On the other hand the court below made a mistake when it awarded to Reineman the proceeds of that part of the property, sold on the Beilstein writ, which he, Reineman, claimed as his own. By this claim he compelled Vetter, the use plaintiff, to protect the sheriff by a bond of indemnity; by it he then held, and still does hold, both Vetter and the officer as trespassers, and by it he sets up a title adverse to the proceedings which has brought the money into court, hence, on the authority of *Bush, Bunn & Co.'s Appeal*, 65 Pa. St., he cannot be permitted to take any of that money. But it is alleged that he is entitled to take as landlord; we answer, yes, so far as the money was made from the tenant's goods, for they were distrainable for the rent due, and that fact, under the Act of Assembly, gives the landlord the right to claim, from the sheriff, the money made from them. But not so as to the landlord's own goods, for they are not subject to distress, therefore, unless he can claim the money as made from his own property, he cannot claim it at all, for, *se judice*, it was not the property of the tenant.

But, as we have already seen by the case above cited, as owner of the goods he was not entitled to take the money made from them by the writ in the sheriff's hands; his position of hostility to that process barred any claim that he otherwise might have had to receive its proceeds.

The case, then, stands thus; Reineman, as landlord, is entitled to any money raised from the sale of the goods of Simon, the tenant, and Vetter is entitled to the proceeds arising from the property claimed by Reineman.

The decree of the court below is now reversed and set aside, and it is ordered that a redistribution be made in accordance with the foregoing opinion, and it is further ordered that the appellee pay the costs of this appeal.

Court of Common Pleas, No. 2.

ELLEN NELSON v. J. LOVE ORR.

Lease to commence in futuro; lessor did not give possession. Held, that on the theory of an implied covenant to give possession, an action would lie against the lessor in covenant, if the lease was under seal, or in assumpsit, if not under seal.

If the lessor was guilty of a positive act, wrongful in its nature and in fraud of the lessee's rights, which prevented the lessee from getting possession, an action on the case would lie.

Plaintiff obtained a verdict for \$200, and at the suggestion of the court released all of it but \$75. *Held*, that even if the cause of action was within the jurisdiction of a justice of the peace, plaintiff had not thereby forfeited her right to costs under Act of March 20, 1810, Sec. 26, *Purd.*, 848.

This was an action on the case. The third count of the declaration alleged that the defendant promised to and agreed with plaintiff on February 28, 1881, that she should have the lease and possession of a certain tenement house in Pittsburgh, April 1, 1881; that in reliance on said promises she removed to said house on that day, "but said defendant in violation of his promises and agreements aforesaid, and in violation of his duty in the premises, did prior to the date last mentioned, fraudulently let and rent said house and procure the same to be occupied by other persons * * * and did fraudulently refuse and neglect to secure the lease, occupancy and possession of said house to plaintiff," and thereby, etc., she suffered damage, etc.

Verdict in favor of plaintiff for \$200. Defendant moved for a new trial on the ground that the damages awarded were excessive; and he also filed a motion in arrest of judgment, setting forth that the third count was in *assumpsit* (*Leber v. Kauffelt*, 5 W. & S., 444; *Steel v. Frick*, 6 P. F. Smith, 172), and was therefore inconsistent with the first and second counts (which set forth an action on the case) so that no judgment could be entered on the verdict.

The plaintiff contended that an action on the case was proper and that the third count followed the summons and set forth a good cause of action *ex delicto*, and cited *McNair v. Compton*, 11 Casey, 28; *Finley v. Hambert*, 6 Id., 195; *Bitner v. Brough*, 1 Jones, 139; *Noyes v. Anderson*, 1 Duer, 352-3; *Driggs v. Dwight*, 17 Wend., 71; 8 N. Y. 119; *Williams v. Oliphant*, 3 Ind., 271; 4 Barb. 281; 6 Barb. 423; and the same rules apply to a contract to lease as a contract to sell land: *McClowry v. Croghan's Administrator*, 1 Grant, 309.

For plaintiff, Messrs. Wm. Yost and C. E. Cornelius.

Contra, C. C. Dickey, Esq.

WHITE, J., in delivering the opinion of the court, said: In an early case in this State—*Cozens v. Stevenson*, 5 S. & R., 421,—it was held that, in a lease to commence *in futuro*, there was no implied covenant to give possession, as against a tenant in possession who wrongfully held over. But if a landlord makes a lease and after-

ward leases to another, or by any other act prevents the first lessee from getting possession, that lessee undoubtedly has his action against the landlord for damages. On the theory of an implied covenant to give possession, he might bring covenant, if the lease was under seal, or *assumpsit*, if not under seal. But if the landlord was guilty of a positive act, wrongful in its nature and in fraud of the lessee's rights, by which he was prevented from getting possession, the lessee might hold him in an action *ex delicto* for the wrongful act and bring an action on the case. That is the plaintiff's claim in the third count of the *narr.* in this action. She charges the defendant with wrongfully and fraudulently preventing her from getting possession by renting the premises to another, etc. The recovery was on that count, for the jury were instructed there was no evidence to justify a verdict on the counts for deceit in making the lease. The verdict of the jury, however, is excessive. The evidence did not justify such an amount.

At the suggestion of the court the plaintiff released all of the verdict above \$75. The defendant then moved the court to enter judgment on the verdict for \$75 *without costs*, according to Act of March 20, 1810, Sec. 26, *Purd.*, 848, which provides that if any person commences a suit cognizable by a justice of the peace, in any other manner than before a justice of the peace "and shall obtain a verdict or judgment therein, which, without costs of suit shall not amount to more than" \$100, he shall not recover costs in such suit.

Opinion by WHITE, J. Filed April 24, 1882.

I think the motion must be refused on two grounds, (1) the *narr.* is in case, (2) the verdict is over \$100. The recovery was on the amended *narr.* It is not very artistically drawn and contains useless averments. But it is not a *narr.* in *assumpsit* for the breach of a contract. It claims damages for the fraudulent acts of the defendant whereby she was prevented from getting possession of the premises she had leased. We so held during the trial, and in the opinion filed on the motion for a new trial. Being an action of case for a fraud, a justice had no jurisdiction.

In addition to that, the verdict was for an amount beyond the jurisdiction of a justice of the peace. The fact that the plaintiff released all above \$75, at the suggestion of the court, to avoid a new trial, does not forfeit her right to costs under the verdict. She had a right to infer that she would recover costs under the order of court as nothing was said on that subject. She might have refused to release, and most

probably would, if she had supposed that by doing so she would not recover her costs.

Motion refused.

Court of Quarter Sessions,

Lawrence County.

OATH OF A GRAND JUROR.

Discrepancies in Forms of Oath—Form as given by Wharton and Bouvier preferred and substituted for that found in Dunlap's and in Graydon's Form Book—English Form of Oath—Law of the Province on the subject—Differences of opinions as to duties of Grand Jurors.

EXTRACT FROM CHARGE OF BREDIN, J., DELIVERED APRIL 10, 1882.

GENTLEMEN:—The oath you have just taken differs somewhat from the oath heretofore administered in this county to Grand Jurors. A presentment made on their own motion by a late Grand Jury in Butler county of a supposed case of infanticide, and the result of the prosecution originating in that irregular manner has led me to a careful examination of the Grand Juror's oath and to the conclusion that the form heretofore in use in this district, found in Dunlap's and in Graydon's form book, is not correct in requiring presentment of those things which the Grand Juror shall know to be presentable here. The form now adopted is, with a slight variation, that found in note to Smith's Laws, Vol. VII, page 685, in Wharton's Criminal Law and in Bouvier's Law Dictionary, using the words, "or come to your knowledge touching this present service" in lieu of "which you shall know to be presentable here," found in the Dunlap and Graydon form. The difference in the language of the two forms is material. The Dunlap and Graydon form is, in its terms, broad enough to require presentment of all indictable offenses known to the Grand Juror, when sworn, to have been committed within the county, for all such are presentable here. The present oath requires presentment only of such matters and things as may be given you in charge or that shall come to your knowledge touching your present service. No demand is thereby made on you for your personal knowledge, but only for your official knowledge acquired as Grand Jurors during your present service as such. It often happens that in the investigation of one offense other violations of law are brought to the knowledge of the Grand Jury that it then becomes their duty to present. This is especially the case

as to violations of the liquor laws, keeping of bawdy and disorderly houses, often exposed in charges of murder and other crimes of violence resulting from intemperance and kindred vices. Such knowledge touches (affects, relates to) the Grand Juror's service. The public health, safety and morals requires the exposure and suppression of these hot-beds of crime, and it is clearly a Grand Juror's duty, outside of his oath, to assist therein. Offenses that affect individuals merely are not within the requirements of the oath in our opinion and need not be presented by the jurors. Our reasons for the abandonment of the one and adoption of the other form of oath are as follows:

The form of the Grand Juror's oath in England, A. D. 1681, as given in Shaftesbury's case, 3 Harg., State Trials, 417, was, "You shall diligently enquire and true presentments make of all such matters, articles and things as shall be given you in charge, as of all other matters and things as shall come to your knowledge touching this present service. The king's counsel, your fellows and your own you shall keep secret. You shall present no person for hatred or malice, neither shall you leave any one unrepresented for fear, favor or affection, for lucre or gain, or any hopes thereof, but in all things you shall present the truth, the whole truth and nothing but the truth to the best of your knowledge. So help you God." See note to Hale's Pleas of the Crown, page 161. This is substantially the oath you have just taken. The form given in "Quarter Sessions with precedents," by Dickinson, 2d Ed., page 95, published in 1820, is, "You, as foreman of this inquest, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge. The king's council, your fellows and your own you shall keep secret. You shall present no man for envy, hatred or malice, neither shall you leave any man unrepresented for fear, favor or affection, or hope of reward, but you shall present all things truly as they come to your knowledge according to the best of your understanding. So help you God. Then the rest of the Grand Jury, by three at a time in order, are sworn in the following manner: The same oath which your foreman hath taken on his part, you and every of you shall well and truly observe and keep on your parts. So help you God." This latter form of the English oath, it will be observed, requires presentment only of matters given the Grand Juror in charge.

Until the publication by the Commonwealth in A. D. 1879, of the "Duke of Yorke's Book of Laws," giving the laws of the province of Penn-

sylvania, passed between A. D. 1682 and A. D. 1700, no reference could be found in our statute books or digests to the Grand Juror's oath. On page 248 of that publication, in Section 4th of a law styled "The Frame of the Government," passed by the Governor with the advice and consent of the Council and Representatives of the province, A. D. 1696, we find it enacted, "The form of the Grand Inquest's attest shall be in these words, viz: Thou shalt diligently inquire and true presentment make of all such matters and things as shall be given thee in charge or come to thy knowledge touching this present service. The king's counsel, the fellows and thy own thou shalt keep secret and in all things thou shalt present the truth, the whole truth and nothing but the truth to the best of thy knowledge. This being given to the foreman, the rest of the inquest shall be attested thus (by three at a time), viz., the same attestation that your foreman hath taken you will well and truly keep on your parts."

This oath is in substance the English form then in use; and as the laws then passed were not printed, it is not surprising that the English form, familiar perhaps, and fuller in stating the motives that should govern a Grand Juror in his presentments, should supersede the provincial oath. Where Judge ADDISON found his authority for the words, "as of those things which they may know of their own knowledge," given in his charge on the Duty of a Grand Jury in A. D. 1792, Addison's Reports, appendix, page 37 (and no doubt the basis for the form in Dunlap and in Graydon's form book), we have not been able to ascertain, but as the words we have substituted therefor are found in the only Pennsylvania Statute on the subject, we have no hesitation in discarding the words, "as of those things which you shall know to be presentable here," convinced that in returning to the old form we are lessening the chances of a false construction by jurors and judges of the duty of a Grand Juror. I may say that for myself I have always instructed the Grand Jury that presentments on their personal knowledge must be confined to such matters as affected the general public, as malfeasances or neglect of duty by public officers, public nuisances, riots disturbing the public peace, misconduct at and betting on elections (the latter offense being made presentable by statute); and this is the view, I believe, generally accepted by judges. Some, however, adhere to the views of Judge ADDISON in the charge before referred to, and differences on this subject are found between judges in the same court. An instance of this is given in note to Am. Ed. of Hale's Pleas

of the Crown, page 157, as between Judges PARSONS and KING, in Philadelphia in 1845. Judge PARSONS, instructing the jury that a Grand Juror aware of a crime having been committed in the county, was bound to give that information to his fellows, while Judge KING refused the process of the court to assist in such an investigation even of a *quasi* public character. Judge PARSONS' view would, in my opinion, convert the Grand Jury from a shield of innocence into an engine of oppression, and while conscientious humane men would shrink from and evade such service, malicious persons would seek it as the surest and safest means of wreaking their vengeance on those they hate.

This difference in the view of a Grand Juror's duty, with another unsettled question as to whether Grand Jurors should be satisfied of the truth of the indictment, or should inquire merely as to whether there be sufficient cause to call upon the accused to answer, is a matter that would justify legislative interference and construction to secure a uniform interpretation, and to that extent administration of the criminal law.

◆◆◆ NEW BOOKS.

ELEMENTS OF THE LAWS; or, outlines of the system of Civil and Criminal Laws in force in the United States and in the several States of the Union. Designed as a text-book and for general use, etc. By THOMAS L. SMITH, late one of the Judges of the Supreme Court of the State of Indiana. New and Revised Edition. Philadelphia: J. B. LIPPINCOTT & Co. 1882. For sale by J. R. WELDON & Co. Price, \$1.50.

We not long ago heard a prominent lawyer of the Allegheny County Bar say that the profession owed a testimonial to the author of every book the object of which is to enable laymen to transact their law business without a trained attorney, and while it is not likely that a subscription paper for the purpose would obtain many signers, yet it is a well known fact that such books have frequently involved those using them in legal troubles to extricate from which or lessen losses apparently inevitable the services of lawyers have been necessary.

Judge SMITH has not written on "Every Man His Own Lawyer," but a treatise, as he says, "to enable any one to acquire a competent knowledge of his legal rights and privileges in all the most important political and business relations of the citizens of the country, with the principles upon which they are founded and the means of asserting and maintaining them in civil and criminal cases." He has done his work with accuracy, and knowledge of the contents of his book would be valuable to any person.

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PITTSBURGH, PA., JUNE 11, 1882.

Supreme Court, Penn'a.**JONES' APPEAL.**

It is not a rigid rule in equity that a grantor must be proved to have been of unsound mind or under undue influence at the very time the deed impeached was executed. If it be shown that he was insane on a particular subject or with reference to a particular person, and the deed is an act referable to that state of mind, no more is needed.

It is sufficient to invalidate any instrument executed for an inadequate consideration by a person of weak intellect to show that the person in whose favor it is framed held a situation of confidence with respect to the maker of such instrument.

Appeal from the decree of the Court of Common Pleas, No. 4, of Philadelphia county.

This was a bill in equity by the committee of John Sidney Jones, a lunatic, against George D. Townsend and Fannie Lee Townsend Jones, praying that a deed from John Sidney Jones to George D. Townsend be declared void, and that a reconveyance be executed, and for an injunction.

The deed was made in 1861, the commission in lunacy issued March, 1873, and the bill was filed November 15, 1873.

For appellant, *Messrs. G. Morgan Eldridge, Francis E. Brewster and F. Carroll Brewster.*
Contra, Messrs. W. W. Ker and Richard Vaux.

Opinion by SHARSWOOD, C. J. Filed January 30, 1882.

It is not a rigid rule in equity that a grantor must be proved to have been of unsound mind or under undue influence at the very time the deed impeached was executed. If it be shown that he was insane on a particular subject, or with reference to a particular person, and the deed is an act referable to that state of the mind, no more is needed. A man may be of perfectly sound mind on all subjects but one, a shrewd man of business, able to make contracts, no one in ordinary intercourse seeing or suspecting that anything was wrong, but touch him on a particular subject and it is at once recognized that he is a madman. The section of Dr. Ray's *Treatise on the Medical Jurisprudence of Insanity on Partial Intellectual Mania*, page 155, is a very curious and instructive one. John

Sidney Jones was a madman of this character. The evidence shows that during a considerable period of his life—comprising the time of the execution of the deed in question and many years before and after—he was decidedly the subject of an insane hallucination in regard to the appellant. He regarded her as a most extraordinary woman; even believing her to be a divine person. She could say or do or wish nothing which was wrong. The evidence makes this out clearly. The consequence was that her influence over him was unbounded. She seems to have got from him whatever bonds or notes she wanted. She testifies that it was for money loaned by her to him. Where did she get this money? She says: "I had about six thousand dollars of my own money at the time I was married. I let the General have as much of it as four thousand dollars. I could not say exactly four; between four and five thousand dollars. The money that I let the General have was my own money independent of him." Where did it come from? It could be very easily shown, or at least explained. Her son says: "I am aware that previous to my mother's marriage to Gen. Jones she had some means, from the fact that she sent me from the east a large remittance, which I retained until she desired it, and then paid it to her. I heard in the family that she inherited property from her father and mother's estate." If she had this large amount of money when she first became connected with Gen. Jones where was it? In bank, in a strong box, in bonds, mortgages, stocks or loans? We are not informed. The facts of the case as testified by herself seem inconsistent with it. "When I was married to Gen. Jones he fed me but I bought my own clothes. I occasionally earned some money in various ways. Doctoring, writing, speculating, buying and selling merchandise, jewels and ornamental things. One time I speculated in a piano." She had for editing the paper called the *Jubilee* six dollars a week and a room to occupy, as an office and a room to sleep in." She adds: "I had my money in the National Trust Company at the corner of Walnut and Third streets. I said what I had in the city of Philadelphia I had in that bank, I had some money in a Savings Bank in Providence. I had about six hundred dollars there. I removed it from that bank I think about 1855, but can't recollect the year. I kept it by me for a good while. I think I put part of it in the old Savings Bank in Walnut street above Third street." Her account with the National Trust Company is in evidence. Beginning October, 1852, a considerable number of small deposits, only one over

\$100, and her balance at the end of the year was \$474. The next year showed a balance of \$575 which remained to her credit. The balance, \$851.75, she withdrew April 4, 1855. She began again January, 1856, with a deposit of \$1,200, which with several small deposits she had withdrawn by November of the same year. It is unnecessary to follow these accounts further. It is hardly necessary to say that they fail to make out a case. The able and elaborate argument of the learned counsel for the appellant failed to convince us that there was any consideration for the deed in question. As the learned president of the court below remarked in his opinion, "it may be doubted whether during the time of these transactions she ever had any property at all except what she received from John Sidney Jones." Under the circumstances of this case, his mental hallucination in regard to her, the *onus* was upon her to make this out clearly. The deed in question she at one time alleged to have been merely as security for loans. She received by compromise \$2,000 of the insurance money on the property, and the evidence certainly is that she received that money as a full settlement of all her claims, and agreed to reconvey the property. Whether she ever was formally married to General Jones or not she certainly occupied a very intimate confidential relation to him, and it is settled beyond controversy by the authorities cited in the opinion of the learned president of the court below, that it is sufficient to invalidate any instrument executed for an inadequate consideration by a person of weak intellect to show that the person in whose favor it is framed held a situation of confidence with respect to the maker of such instrument.

Decree affirmed and appeal dismissed at the costs of the appellant.

RICHARDSON v. THE PHILADELPHIA AND READING COAL AND IRON CO.

To require an affidavit of defense the copy of book entries filed should show a *prima facie* charge against the defendant in the action.

The copy should not bear on its face the visible marks of not being a copy of actual original entries.

Where an affidavit avers that the defendant bought the goods as the agent of the party charged in the copy filed, and avowed his agency at the time and previous thereto, and that such agency was known and acknowledged in the transaction, such affidavit is sufficient to prevent judgment.

Error to the Court of Common Pleas, No. 3, of Philadelphia county.

The action below was by the Philadelphia and Reading Coal and Iron Company against James O. Richardson.

The following copy of original book account was filed:

Jas. O. Richardson, September 8, 1880.	
1880, September 4th and 6th. For Cumberland Iron Ore furnished the Dauphin Furnace:	
September 4th and 6th, 1880, 118 1660-0000 tons @ \$2.....	\$233 48
September 10th, 1880. For Cumberland Ore furnished the Dauphin Furnace, September 10th, 1880, 153 780-000 tons @ \$2.....	
	306 70
	<u>\$540 18</u>

For plaintiff in error, *Wm. H. Browne, Esq.*
Contra, William W. Ledyard, Esq.

Opinion by GREEN, J. Filed January 23, 1882.

In this case judgment was entered against the defendant, James O. Richardson, for want of a sufficient affidavit of defense. The only paper filed as the basis of the plaintiff's claim was what purported to be a copy of the original book account. It was objected to as insufficient to authorize judgment to be entered upon it, and we think the objection should have been sustained. An inspection of the paper shows that it exhibits on its face the fact that the ore, for the price of which recovery was sought, was furnished to the Dauphin Furnace. There is absolutely nothing to show why or how James O. Richardson was liable to pay for goods furnished to the Dauphin Furnace, and without some allegation asserting such liability, it is difficult to understand how a liability can be assumed by a judicial tribunal. Moreover, the copy of account bears the visible marks of its not being a copy of actual original entries. It commences with the date "September 8, 1880," and the very next item is "1880, September 4th and 6th, for Cumberland Iron Ore furnished the Dauphin Furnace." When was this ore sold? If on the 8th, it is not supported by an entry on the "4th and 6th." If on the 4th and 6th, then, to constitute a good book entry, it should have been entered in the books before the 8th. The next entry is still more objectionable. It is dated September 10, 1880, and yet is entered under date of September 8th. Certainly such entries as these could not be given in evidence without explanatory testimony, if at all. In the case of *Wall v. Dovey*, 10 P. F. Smith, 212, we held that "book entries" in the affidavit of defense, law means the entries in the original book, which would be competent to go to a jury as evidence of a plaintiff's claim.

On page 213, the present Chief Justice, in delivering the opinion of the court, said: "The Legislature did not say, because it did not mean, that on filing any claim for a book debt, the plaintiff should be entitled to judgment, but it must be a copy of 'book entries,' and the implication is a necessary one; that they must be such entries as, when duly proved, will entitle

the plaintiff to recover. The plaintiff is not required to support his claim by oath or affirmation. Why then should the defendant be put to his affidavit of defense, unless the copy filed shows a *prima facie* case? The same rule applies to bills, bonds, notes or other instruments of writing for the payment of money. They must fasten on their face, if genuine, a liability on the defendant before he can be required to deny the genuineness, or set up what may be matter of defense. In this case the book entries contain no charge against the defendant."

In addition to the foregoing the defendant, in his affidavit of defense, swore distinctly as follows: "That the iron ore furnished the Dauphin Furnace Company, as set forth in the copy of the plaintiff's book account filed, was not furnished the deponent as an individual, but as agent, known and acknowledged as such in this transaction for the receivers of the Dauphin Furnace, Roas and McGinness." In the supplemental affidavit the defendant alleges that he bought the goods as agent, "avowing his agency at the time and previous thereto." We are of opinion that these averments in the affidavits of defense are a sufficient assertion that the iron ore in question was neither sold, delivered or furnished to the defendant in his individual capacity, and that, therefore, the plaintiff is put to proof of the facts necessary to make out an individual liability.

Judgment reversed and procedendo awarded.

[In this cause the defendant paid the judgment on execution issued before taking writ of error. The Supreme Court on rule to show cause awarded a writ of restitution. The point of practice will be noted.]—*Legal Intelligencer.*

STONE et al. v. McMULLEN.

Testator devised his property to his two sons, Hugh and George, "to be equally divided between them, to them, their heirs and assigns forever." He further provided, "that if either of my two sons, Hugh or George, should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land aforesaid."

Held, that this only gave an estate tail.

Error to the Court of Common Pleas of York county.

The following is a copy of the opinion of the court below, WICKES, A. L. J., (now P. J.), delivered on April 11, 1881:

The controversy in this case turns upon the construction of the will of Hugh McMullen, the elder, dated the 29th of November, 1792, and admitted to probate in March, 1793. The language of the will (so far as concerns this case) is:

"I give and devise to my two sons, Hugh and George McMullen, the plantation that I now live on, to be equally divided between them, to them, their heirs and assigns forever. Subject to the payment of thirty shillings yearly to my daughter during her natural life, and one-third of the clear rent yearly to my dearly beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George, should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land as aforesaid. * * * It is further my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures or bargains of importance before they arrive to the age of twenty-one years, but by the approbation and consent of my executors."

When Hugh McMullen died in 1793 he left to survive him six children, of whom Hugh and George were the youngest, being twelve and sixteen years of age, respectively. They took possession of the land devised to them by their father, and early in the present century divided it into two parts, each taking one.

Hugh died, leaving two daughters, Elizabeth and Mary Ann, to whom he bequeathed and devised his property.

Mary Ann died intestate and without issue in 1879. Elizabeth married David Newcomer and survived him.

In February, 1879, she conveyed part of the land in dispute to Thomas Stone, one of the defendants, and by deed of equal date another part of the said land to Jacob Wall, the other defendant. Elizabeth died October 29, 1879, without issue.

George McMullen, son of the testator, died December 10, 1850, leaving five children, all of whom have since died, leaving children to survive them, one of whom is the plaintiff in this case.

George sold and conveyed during his lifetime his part of the real estate devised to him by his father, and it is sought to recover in this action not only that portion of the land devised to Hugh, but that also which George sold during his life, and which, by various conveyances, has also passed into the possession of these defendants. But it is the admitted fact of the case that the purchasers from George, and those who hold under him, have been in continued and adverse possession of this part of the land since its conveyance in 1819, and as the right of action accrued on the death of George in 1850, it was conceded by the plaintiff's counsel that no recovery can be had, because of the bar of the statute, of so much of the land as George took under his father's will.

We therefore dismiss this branch of the case.

The important question before us grows out of the construction we are asked to give to the clause of the will devising to Hugh and George the real estate in controversy, for it is not pre-

tended that any other obstacle is presented to a recovery by the plaintiff, of so much of the land as was devised to Hugh, except to determine the character of the estate taken by him under his father's will. Without attempting to wade through the great multitude of authorities relating to this subject, but relying confidently upon the correctness of the principles asserted in *Eichelberger v. Barnitz*, 9 Watts, 447, and *Langley v. Heald*, 7 W. & S., 96, which Mr. Justice BELL said, in *Eby v. Eby*, 5 Barr, 463, "settle the law in Pennsylvania," we desire to advert, as briefly as possible, to those and a few of the subsequent cases, for their name is legion, to ascertain the fundamental principles which underlie this inquiry and must determine the result. In *Eichelberger v. Barnitz*, the general rule was asserted to be that the words "if he die without issue," or "on failure of issue," or "for want of issue," or "without leaving issue," then over, following a devise in fee, that the estate of the first taker is a fee tail, because the technical meaning of the words import an indefinite failure of issue, and that while the limitation over would be good as a remainder, it could not stand as an executory devise, because too remote.

But *Langley v. Heald* furnishes us an illustration of an exception to the general rule laid down in *Eichelberger v. Barnitz*, which is, that where there are expressions in the will clearly restricting the "dying without issue," etc., to a failure of issue at the time of the death of the first taker, or to some other time or event, which must occur, if at all, within the time allowed for the happening of a contingency on which an executory devise may be limited, there the first devisee takes an estate in fee simple, and the limitation over is void as a contingent remainder, but good by way of executory devise.

Such is also the doctrine of *Williams v. Conrad*, 1 Gr., 21, of *Lapsley v. Lapsley*, 9 Barr, 130, of *George v. Morgan*, 4 Harris, 107, and a multitude of other cases to which I need scarcely refer.

Indeed the difficulty does not seem to be with the abstract principles of law, but rather their application to this particular case. It is asserted in the first place that the testator meant a failure of issue either at his own death or at that of the first taker, and the word "survivor" is said to indicate that intention.

When we remember that the devisees were only twelve and sixteen years of age, respectively, at the testator's death, it is difficult to conceive that such a thought could have entered his mind as a failure of issue at that time.

I did not, however, understand this view of the case to be seriously pressed.

But it was earnestly insisted that the death of the first taker was the period fixed by the testator when the failure of issue was to happen, if at all.

There is absolutely nothing on the face of the will to indicate such an intention, except the limitation over to the survivor.

The case most relied upon, and which it was said nearly resembled the one at bar, was *Anderson v. Jackson*, 16 John., 379. There the devise was in fee to the two sons, and in a subsequent part of the will the testator directs that "if either of the said sons should depart this life without lawful issue, his share or part shall go to the survivor." And this was held to create a defeasible fee in the first taker, with a limitation over by way of executory devise. But it is impossible to rise from a careful consideration of that case, without the conviction that it was decided in the face of the English authorities, and only because under the New York statute regulating descents, a current of decision existed, commencing with *Fosdick v. Cornell*, which could not be disturbed without unsettling the titles to real property. Chancellor KENT delivered a dissenting opinion, in which he reviews the cases at great length, commencing with the earliest reported case, following the statute *de donis*, and he asserts as the sum and substance of his elaborate examination and reasoning, "that no point of law was ever more completely established and better fortified by all that is venerable in authority on each side of the Atlantic" than that the words of the devise mean an indefinite and not a definite failure of issue.

And he further says, "that the contrary doctrine was mistakingly, and upon a very imperfect examination of the subject, declared in the Supreme Court in *Fosdick v. Cornell*." So that the case is rather an authority against the position of the defendant.

In *Caskey v. Brewer*, 17 S. & R., 443, a case involving the same question, Mr. Justice HOUTON took occasion to say, after affirming the English rule as our own, "that New York seems to form, for the last twenty years, an exception."

The rule, that the subsequent limitation over to the survivor or survivors of a class of persons *in esse* when the will is made, takes effect as an executory devise and not as a remainder limited upon an indefinite failure of issue, has never prevailed in this State, except in bequests of personal property, where the courts lay hold on any word or circumstance in the will, how-

ever slight, that may seem to afford a ground for such a construction.

Our cases are full to the point, and they but echo the English authorities on this subject.

In *Hope v. Taylor*, 1 Burr., 268, there was a disposition of the whole of testator's real and personal estate to several, with a limitation over to the survivors, if either should die without issue lawfully begotten, and it was adjudged to be an estate tail in the real property, and the limitation over of the personal estate void. In *Amelia Smith's Appeal*, 11 Harris, 9, there was also a devise of real and personal property to testator's children in equal shares, with a provision that in case of the death of any of them without issue, his or her share should be equally divided among the survivors, it was held to pass an estate tail in the land to the first taker, with vested remainders over in fee, and the absolute title to the personal property. And in *Snyder's Appeal*, 38 *Legal Intell.*, 54, the latest reported case on this subject, where the authorities are collected and reviewed, the same distinction is taken and the same doctrine prevails.

These cases serve to illustrate the subtle distinctions taken in support of limitations of personal property, but they serve also to show that the rule does not apply when the devise over is of real estate.

Nor does there seem to be any reason in the case of real property why the survivor should be living at the happening of the event on which the limitation over is made to depend. If the language of the will is such as to create an estate tail in the first taker and a remainder in fee to the survivor, the remainder would vest immediately on the death of the testator and pass on the failure of issue to the survivor in his own person, if alive, and if dead, to his heirs, who would be capable of taking at whatever period of time the failure of issue might happen: *Wilmont v. Wilmont*, 8 Ves., 10; *Davidson v. Dallas*, 14 *Id.*, 576; *Caskey v. Brewer*, 17 S. & R., 441; *Amelong v. Dorney*, 16 *Id.*, 325; *Lapsley v. Lapsley*, 9 Barr, 130; *Braden v. Cannon*, 1 Grant, 65; *Haines v. Witmer*, 2 Yeates, 400; 5 Randolph's Reports, 273 and 308.

I have found but a single instance since *Eichelberger v. Barnitz*, in our own reports, at variance with the principles declared and the cases cited to sustain them.

In *Johnson v. Curran*, 10 Barr, 408, a decision which stands so severely alone in our reports, that it serves rather to warn us of the error it contains, than to furnish an authority we may safely follow, the court gave to the word "survivor" the effect which we are asked to give it here, but it has been doubted, until, as we have

said, it is no longer authority: *Criley v. Chamberlain*, 6 Casey, 165; *Curran v. McMeen*, 5 P. F. Smith, 490.

I am therefore of opinion that the word "survivor," in a devise of real estate, does not by force of any settled legal construction import a definite failure of issue, or confine the limitation over to a person *in esse* at the death of the testator.

But, it is argued, there is a power of sale contained in this will, and that even admitting the technical words of the devise, would otherwise create an estate tail, that such an estate would be wholly inconsistent with the power conferred.

The language is, "further it is my will that my said two sons shall neither rent, bargain or sell the land aforesaid, nor enter into agreements, indentures or bargains of importance before they arrive to the age of twenty-one years, but by the approbation and consent of my executors."

It is to be observed that this direction of the testator deprived the two minors of no right the law had not already deprived them of.

It would therefore seem to have been written in ignorance of the legal disabilities already imposed upon them.

The clause is not punctuated, and it is not easy to say precisely what it means. It is not, however, pretended that it confers an absolute power to sell, but it is said to give a conditional power.

It is certain the power was never exercised. It is well settled that although a particular power, if executed, might make a fee in the appointee, yet, if not executed, the estate limited in default of appointment is vested.

Said the late Judge GEORGE W. WOODWARD, in *Barnet v. Deturk*, 7 Wright, 95: "It may be, though this point is not considered, that if no attempt to exercise the authority had been made, * * * the provision would have been unimportant." And said Judge STRONG, in *Physick's Appeal*, 14 Wright, 136: "If no appointment was made, the will is to be read as if it contained no power of appointment."

In *Dodson v. Ball*, 10 P. F. Smith, 492, it was held that a power to appoint, if not exercised, will not operate to enlarge a life-estate into a fee.

And again, it is said by TILGHMAN, C. J., in *Clark v. Baker*, 3 S. & R., 479: "This power (viz., a power to sell) is said by the defendants to be inconsistent with an estate tail. Not at all. It is collateral to the estate tail, but not inconsistent. The testator had a right to give an estate tail, subject to be defeated by this power."

I cannot, however, regard the will as giving,

even by implication, a power to sell. It seems to have been a mere after-thought of the testator, by which he desired to prevent them from selling at all, or even renting without the approbation of his executors. If, as is contended, he intended to give a fee simple to his sons, certainly we are not at liberty to suppose that he further intended to impose restrictions upon the alienation of the property devised, for that he could not do. But if it was his intention, as the words of the devise clearly indicate, to create an estate tail in each of his sons, with cross remainders in fee, then a doubtful power, never exercised, ought not to be permitted to defeat the clear purpose of the testator.

We have not commented upon the words "die without legitimate issue," as no question was suggested as to their effect, if standing alone: 24 P. F. Smith, 418; 6 Norris, 362; 7 *Id.*, 127.

We have considered the will from the standpoint of its own phraseology, and not in the light of subsequent events. Not only do we think the technical words of the will are to be taken in their technical sense, but we know of no other sense in which they could so well execute, what we conceive to have been the intention of the testator. If the testator had been asked, "suppose your son Hugh should die leaving issue, and that issue should die in one month afterwards, how, in that case, do you intend his part of your estate shall go under your will?" Would not the probable answer have been, "why, to my surviving son, surely." And suppose the further question addressed to him, "but if your son George should have departed this life before the failure of Hugh's issue, leaving, however, children or grandchildren to survive him," can it be doubted that he would have declared, "then to such posterity."

And yet that intention would be entirely defeated by the construction contended for, and George never could have taken at all, even had Hugh's issue survived him but a single hour.

If we are correct in our interpretation of the meaning of this will, it can make no difference that Hugh McMullen died leaving issue to survive him, which issue subsequently became extinct, for an indefinite failure of issue would embrace that event.

Nor can it affect the limitation over, which would be good as a remainder, although void as an executory devise. Nor can the death of George McMullen during the lifetime of the issue of Hugh affect the result. For if the limitation over operates as a vested remainder in fee, it would, on the failure of Hugh's issue,

pass to George, if living, not as a life-estate or in tail, but in fee simple, and if dead, would descend to his heirs: *Lapsley v. Lapsley*, 9 Barr, 130; *Braden v. Cannon*, 1 Grant, 65; *Heffner v. Knepper*, 2 Watts, 21.

Whatever hardship may result to these defendants by reason of the construction we have placed upon this will, is of course to be regretted.

We can only say, however, as did Mr. Justice SHIPPEN, in *Haines v. Witmer*, 2 Yeates, 406, that "considerations of this kind must not induce us to unsettle established rules of law, lest we set all titles to real property afloat."

Without, however, pursuing this subject further, for the reasons given, we enter judgment for the plaintiff under the third judgment clause of the case stated, for the undivided one-tenth part of the land which Hugh McMullen took under the will of his father, and died seized of, with costs of suit.

The specifications of error were as follows:

1. The court erred in entering judgment for plaintiff (below) under the third judgment clause of the case stated, for the undivided one-tenth part of the land which Hugh McMullen took under the will of his father, and died seized of, with costs of suit.

2. The court erred in not entering judgment for the defendant.

For plaintiff in error, *Messrs. V. K. Keesey and R. L. Muench.*

Contra, W. C. Chapman, Esq.

Opinion by STERRETT, J. Filed October 3, 1881.

The will of Hugh McMullen, the elder, admitted to probate in March, 1793, contains the following provisions upon the construction of which the present contention hinges. viz:

"I give and devise to my two sons, Hugh and George McMullen, the plantation that I now live on, to be equally divided between them, to them, their heirs and assigns forever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth during her natural life, and one-third of the clear yearly rent to my beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George, should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land aforesaid. * * * Further, it is my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures or bargains of importance before they arrive at the age of twenty-one years, but by the approbation and consent of my executors."

These are the only clauses in the will that can have any bearing on the question presented for our consideration. The testator left six children, of whom Hugh and George, then respectively sixteen and twelve years of age, were the youngest. They took possession of the farm devised to them by their father, and shortly

afterwards divided the same between them. Hugh died testate in 1856, leaving two daughters, Elizabeth and Mary Ann, to whom he devised his portion of the land. In February, 1879, Mary Ann died intestate and without issue. A few days thereafter Elizabeth, who had survived her husband, conveyed part of the land to Stine, one of the defendants below, and another part to Wall, the other defendant; and, in October of the same year, she died without issue. The issue of Hugh thus became extinct. George, the other devisee, died in December, 1850, leaving five children, all of whom have died since, leaving children, of whom the plaintiff below is one. During his lifetime, in 1819, George sold his part of the real estate, and the plaintiff sought to recover in this action, not only that portion of the land devised to Hugh, but also that which George sold during his lifetime, and which, by sundry conveyances, had in the meantime passed to the defendants below. Inasmuch, however, as the purchasers from George, and those claiming under him, have been in continuous adverse possession since 1819, and as the right of action accrued in 1850, it was properly conceded that there could be no recovery as to that part of the land. But the statute of limitations has no application to Hugh's portion, and the only question that arises in regard to it is, what estate did he take under his father's will, an estate in fee simple or fee tail? This depends solely on whether the devise over was upon a definite or an indefinite failure of issue. If it was the latter, the devisee clearly took only an estate tail, as the court held, and in that event the judgment is right. In the first clause, above quoted from the will, the testator devised his plantation to his two sons, "their heirs and assign forever." Standing alone, the language thus employed would undoubtedly give them a fee simple; but it is well settled that a testator may restrain the generality of a devise by subsequent expressions, and convert that which otherwise would have been a fee simple into an inferior interest; and in this mode, more frequently than in any other, is a particular estate given: *Middleworth's Administrator v. Blackmore*, 24 P. F. Smith, 414. The generality of the devise was so restricted in this case, in its legal signification the word "issue" very nearly resembles the technical phrase, "heirs of the body," and it is well settled that when real estate is devised, by one or more limitations in the same will, to a person and his issue, the word "issue" will be construed as a word of limitation, so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indi-

cative of a contrary intent. Such expressions as "if he die without issue," "on failure of issue," "for want of issue," "without leaving issue," and the like, have frequently been considered; and, when standing alone in a will, the law defines them and gives them a precise and certain signification. They import an indefinite failure of issue, and thus create an estate tail in the first taker. The technical meaning given to such phrases has long since become a settled rule of property, from which it would be unsafe to depart, except in cases that come within a recognized exception to the rule. The following are a few of the many cases in which the subject has been considered: *Clark v. Baker*, 3 S. & R., 470; *Eichelberger v. Barnitz*, 9 Watts, 447; *Langley v. Heald*, 7 W. & S., 96; *Eby v. Eby*, 5 Barr, 463; *Angle v. Brosius*, 7 Wright, 187; *Kleppner v. Laverty*, 20 P. F. Smith, 70. According to these and other authorities that might be cited, the language employed by the testator, "if either of my two sons, Hugh or George, should die without legitimate issue," must be taken to mean an indefinite failure of issue, from which it follows that the devisees took an estate tail.

But, while the rule of law which thus fixes the meaning of certain forms of expression is, in a certain sense, an unbending one, it is not without some exceptions. It is conceded, as already intimated, that the construction referred to will give way when the will contains other expressions which clearly indicate that the technical words were intended to have a different meaning. The cases, however, show that the intention not to use the words in their legal sense must be unequivocal, and so plain that no one can misunderstand it: *Angle v. Brosius*, *supra*; *Guthrie's Appeal*, 1 Wright, 9; *Physick's Appeal*, 14 Id., 128. In an early English case we have an instance in which the legal sense was controlled by plain and unequivocal words. The testator died leaving issue, three sons, William, Thomas and Richard. He devised land to Thomas, subject to the payment of twenty pounds to Richard at the age of twenty-one years, and then provided that if Thomas died "without issue, living William, his brother," the latter should have the lands in fee. The question was whether Thomas took an estate in fee or fee tail, and it was held that the clause "without issue, living William," did not mean an indefinite failure of issue, but a dying, in the lifetime of William without issue.

It is claimed by the plaintiff in error that the death of whichever of the two sons might happen to die first was the period fixed by the testator when the failure of issue was to occur,

and that this definite failure of issue is indicated by the concluding words of the devising clause, "the survivors shall inherit, etc." In support of this view, *Anderson v. Jackson*, 16 John., 379, is cited. In that case there was a devise in fee to two sons, with a subsequent direction that "if either of the said sons should depart this life without lawful issue, his share or part should go the survivor," and it was held that the words of the devise created a defeasible fee in the first taker, with a limitation over by way of executory devise. But that case is contrary to the general current of authority, both in England and here; and the same may be said of *Johnson v. Curran*, 10 Barr, 408, and other cases that are supposed to recognize the same doctrine. All the cases in which the question has been considered, with very few exceptions, are opposed to giving any such effect to the word "survivor" as is claimed for it by the plaintiff in error: *Wilson v. Dyson*, Raym., 426; *Chaddock v. Cowly*, Cro. Jac., 495; *Roe v. Scott et al.*, 2 Fearn, 203; *Haines v. Witmer*, 2 Yeates, 400; *Clark v. Baker*, 3 S. & R., 470; *Heffner v. Knepper*, 6 Watts, 18; *Lapsley v. Lapsley*, 9 Barr, 130; *Smith's Appeal*, 11 Harris, 9; *Rancet v. Cresswell*, 6 Casey, 158; *Hope v. Rusha*, 7 Norris, 127. In one of the English cases, *Roe v. Scott et al.*, *supra*, the words were "if either of my three sons shall depart this life without issue of his or their bodies, then the estate or estates of such sons shall go to the survivors or survivor," and the words were held to create an estate tail. The devise in *Smith's Appeal* was of real and personal property to the testator's children, with a provision that, in case of death of any of them without issue, his or her share should be equally divided among the survivors, and, as to the land, it was held to pass an estate tail to the first taker.

The subsequent clause in regard to renting or selling the land can have no effect on the construction of the will, so far at least as the present question is concerned. All the questions arising in the case are so well discussed and the authorities so fully cited in the opinion of the learned judge of the Common Pleas that it is unnecessary to add anything to what is there so well said.

Judgment affirmed.

CONSER'S APPEAL.

The doctrine of equitable subrogation does not apply except in cases where both funds are in the hands of the common debtor of both the creditors. *Ebenhardt's Appeal*, 8 W. & S., 327, and *Lloyd v. Galbraith*, 8 Casey, 108, followed and affirmed.

Appeal from the Court of Common Pleas of Clinton county.

Opinion by STERRETT, J. Filed October 3, 1881.

The question is whether the facts in this case were sufficient to justify the court in making the order of subrogation.

In May, 1875, a judgment was entered against A. B. Conser in favor of D. K. Heckman for \$1,000 as collateral security for the payment of a note made by the former to the order of the latter, and by him indorsed to the order of J. C. Motz & Co. That judgment became a lien on two parcels of land then owned by the defendant, A. B. Conser. Within a month thereafter he conveyed one of them to his father, the appellant, for the consideration of \$3,400, payable in several installments extending over a period of three years. Shortly after the sale an agreement was entered into between the vendor and vendee, by which the payments were to be applied, first to the note above mentioned, and then to the note held by the Lock Haven National Bank, etc., as therein specified. That agreement was executed on June 21, 1875, three days after the date of the conveyance from the son to his father. In December following John A. Marshall obtained judgment against his son, A. B. Conser, for \$700, and on January 8th and 24th, 1876, Smith & Seltzer, and Artman, Dillinger & Co., the appellees, respectively obtained judgments against him, the former for \$211.88, and the latter for \$105.02. The three last mentioned judgments in their order became liens on the remaining piece of land; and, by virtue of an execution issued on the Marshall judgment, the same was sold by the sheriff for \$800, which was distributed as follows, to wit, \$288.45, balance in full to the Heckman judgment, \$461.67 to the Marshall judgment, debt, interest and costs, and the residue to the Smith & Seltzer judgment on account, leaving the balance of the latter and the whole of the Artman, Dillinger & Co. judgment unsatisfied. These two creditors then petitioned the court for an order subrogating them respectively to the rights of Heckman in his judgment to the extent that the same was paid out of the proceeds of the sheriff's sale. In support of the application it was urged that it would be inequitable to take part of the fund, on which alone petitioners had a lien, and apply it to the satisfaction of the balance due on the Heckman judgment which Levi Conser, the appellant, had agreed to pay out of the purchase money of the lot conveyed to him. On the other hand the application was resisted by appellant on the ground that there was no equity to support the subrogation, and that having paid the whole of the purchase money of the lot conveyed to him, the lien of

the judgment against his lot should not be preserved by an order of subrogation. The allegation that the purchase money was fully paid was disputed, but aside from that the appellees had no right to enforce the judgment against land which appellant had acquired before they obtained their judgment against his vendor. There was no privity of contract whatever between them and appellant, though there was between him and A. B. Conser. If appellant was indebted to the latter, that indebtedness was the subject of attachment in execution at the suit of A. B. Conser's creditors. Nor were the appellees in a position to successfully invoke the equitable principle that when a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien only on one of the funds, the former may be compelled to levy his debt out of the fund to which the latter cannot resort; or, what is tantamount thereto, if the former takes his money out of the fund, on which alone the latter has a lien, he may to that extent be subrogated to the rights of the former as against the other fund. This equitable rule does not apply except in cases where both funds are in the hands of the common debtor of both creditors, which is not the case here: *Ex parte Kendall*, 17 Ves., 520; *Ebenhardt's Appeal*, 8 W. & S., 327; *Lloyd v. Galbraith*, 8 Casey, 108. In one of these cases the principle applicable to a state of facts similar to the present case is fully discussed. A judgment had been obtained against a debtor who then owned three several tracts of land. He afterwards sold one of them and took a note for part of the purchase money, coupled with an agreement to pay the same on the judgment. Subsequently other judgments were obtained and became liens on the two remaining tracts, which were then sold on an execution issued on the first judgment, and the proceeds applied to payment of it in full. The junior judgment creditors then obtained an order subrogating them to the rights of the first judgment creditor, so far as to allow them to collect a sum equal to the purchase money of the tract sold by their debtor, but this court held, on the principle above stated, that they were not entitled to the order, and it was accordingly reversed: *Ebenhardt's Appeal*, *supra*.

We are of opinion that the appellees did not bring themselves within the equitable rule recognized in the cases above cited.

The order of June 20, 1880, is reversed and set aside and the rule to show cause, etc., is discharged.

For appellant, *C. S. McCormick, Esq.*

Contra, Messrs. E. P. McCormick & Merrill.

S. E. CAROTHERS, Surviving Partner, Defendant Below, v. CHARLES A. O'BRIEN.

In an action for libel where the *narr.* alleges the publication to have been made in a weekly issue of a newspaper, it is admissible to prove that the same words were published in a daily issue of the same paper for the purpose of showing a wider circulation of the libel. It is not competent to prove that an information for larceny by bailee was pending at the time of publication, when the libel averred as a fact that the plaintiff had failed to apply the money of a client to the purpose for which he was directed—the plea being not guilty.

The court below charged: "If there is any outrageous wrong or express malice you may add punitive damages to punish the defendant." *Held*, not to be error.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

This was an action for libel brought by the defendant in error against the surviving editor of *The McKeesport Times*, a weekly newspaper, the libel consisting in the publication of these words: "Charles O'Brien, Esq., a young Pittsburgh lawyer, is in trouble for failing to apply the money of a client to the purpose for which he was directed."

The declaration alleged the publication to have been made in the weekly issue of June 12, 1880. Upon trial the plaintiff below was permitted to prove, under objection, that the same article appeared in *The McKeesport Daily Times* of June 5, 1880.

The defendant pleaded not guilty and offered to prove that at the time of the publication an information had been made against the plaintiff charging him with larceny by bailee, which information had been returned to court and was pending at the time of publication. This offer was refused and bill sealed.

In charging the jury, the court, after disposing of the question of compensatory damages, said: "If there is any outrageous wrong or express malice you may add punitive damages to punish the defendant."

To the admission of the plaintiff's evidence and the refusal of the defendant's offer above reported, and that portion of the charge of the court quoted, the defendant below excepted.

For plaintiff in error, defendant below, *Messrs. J. S. Ferguson and W. A. Dunshee.*

Contra, Messrs. A. M. Brown and George H. Quail.

PER CURIAM. Filed October 24, 1881.

The evidence that the same publication was made in two different issues of the same paper was clearly admissible as showing a wider circulation of the libel. The information against the plaintiff below clearly did not excuse, much less justify the words charged, as the publication of a matter in a proceeding in a court of justice.

The libel averred as a fact that O'Brien had failed to apply the money of a client to the purpose for which he was directed, and did not purport to be a report of the proceeding. The plea was not guilty. There was certainly nothing of which the plaintiff in error has any right to complain in the answer to the defendant's second point. Nor was there anything wrong in the remarks of the learned judge upon the subject of punitive damages.

Judgment affirmed.

Orphans' Court.

In Re Estate of GEORGE WIBLE, Deceased.

A bequest of the proceeds of "movable property and stock," directed to be sold, is specific.

Exceptions to adjudication of audit.

After making specific devises of his real estate, etc., testator provided as follows:

"And further, I give and bequeath to my two grandsons, George W. Gesler and James Gesler, Five Hundred dollars to each of to be put on interest at my disease until they arrive at the age of twenty-five years, and further direct that all my moveable property and stock be sold at my disease, except the household and kitchen furniture, and the proceeds to be equally divided amongst all of my children."

The record in this case shows that the testator's assets consisted of (1) real estate, (2) such movable property as is ordinarily used about a farm, and (3) notes. The proceeds of the notes were insufficient to satisfy in full the debts and general legacies to testator's grandsons.

It is claimed that the bequest of the proceeds of testator's "movable property and stock" to his children was general and residuary and that his legacies to his grandchildren should be paid in full.

Opinion by HAWKINS, P. J. Filed May 27, 1882.

That the expression, "movable property," was used by testator in a restricted sense is apparent from the face of the will. It is coupled with a bequest of his "stock" which would have been unnecessary had it been used in the ordinary sense. And the exception out of the bequest of "household and kitchen furniture" shows that he had specific property in view: *Lightfoot v. Lightfoot*, 27 Ala., 351; *Everett v. Lane*, 2 Ired. Eq., 548. It certainly did not include notes; for by a well settled rule of construction these cannot be presumed to have been intended to be made the subject of sale: *Heineman's Appeal*, 28 PITTSBURGH LEGAL JOURNAL, 171. There is nothing in the language of the will from which it can be inferred that the bequest of the proceeds of testator's "movable property and stock" was used in a residuary sense. The

mere fact that it was the final bequest does not make it so. It would be an absurdity to say that had there been a surplus of cash left by testator, after payment of his debts and general legacies, legatees of the proceeds of sale of his "movable property and stock" could claim it.

It was said in *Walls v. Stewart*, 16 Pa. St., 275, that "where the gift is of the fund itself, in whole or in part, or is so charged upon the object made subject to it, as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object."

It has been held in accordance with this principle that the gift of the proceeds of sale of real estate, directed to be sold, is specific: *Theobald on Wills*, 110; *Ashton v. Ashton*, Cas. t. Talbot, 152; *Cryder's Appeal*, 11 Pa. St., 72. So the bequest of the proceeds of the real estate, furniture, etc., directed to be sold, has been held specific: *Page v. Leapingwell*, 18 Ves., 463; 2 Lead. Cas. Eq. 484.

The principle of these cases governs the present. The gift here, as there, is of a specified portion of testator's estate—distinctly separated by description from the rest—capable of ascertainment and therefore certain: 2 Lead. Cas. Eq. 501. It is "a gift of the fund itself." Had it been sold in testator's lifetime, these legatees would have gotten nothing out of the personal estate under the will. Their legacy would have been adeemed.

The result of this construction is that the proceeds of the notes left by testator fall into the general personal estate, and the general legacies are payable thereout. The principle invoked by the exceptants that no one will be presumed to have died intestate as respects any part of his estate, where the words of the will can be construed to carry the whole, has no application here. There is no intestacy. The whole estate has been disposed of, and that these legatees will not get their legacies in full is probably owing to the fact that no fund was specially set apart for their payment as was done with respect to testator's children, who must be supposed to have been the primary objects of his bounty, or because testator miscalculated the amount of his debts. But even had there been a surplus of the proceeds of the notes, after payment of debts and general legacies, there are no words in the will which could be fairly construed to carry it.

The decree must therefore stand and the exceptions be dismissed.

For legatees, *M. H. McGeary, Esq.*

For accountant, *Walter G. Crawford, Esq.*

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PITTSBURGH, PA., JUNE 21, 1882.

Supreme Court, Penn'a.

BENTLEY'S EXECUTOR'S APPEAL.

Presumption of payment. Distinction between proof necessary to show a new contract when a debt is barred by the statute of limitations, and the proof necessary under a *plea of payment*.

A legacy unclaimed for more than twenty years is presumed to have been paid, and the burden of proof lies on the claimant to show that such is not the case. Especially is this true where the executor lived almost twenty years after the legacy became due.

Appeal from the decree of the Orphans' Court of Philadelphia county.

Opinion by TRUNKEY, J. Filed February 27, 1882.

A debt which has been due and unclaimed and without recognition for twenty years, in the absence of explanatory evidence, is presumed to have been paid. This presumption, *prima facie*, obliterates the debt, and the *onus* of proof is upon the creditor, not to establish a new contract, as is the case when a debt is barred by the statute of limitations, but to show that payment of the debt has not been made: *Reed v. Reed*, 46 Pa. St., 239. In that case within twenty years, the debtor admitted to the creditor and to strangers that he had not paid the debt and said he would not, and it was held that the presumption of payment was rebutted. Here the sum of the testimony is that the executor said to a third person that he would not pay the legacy because the legatee was rich enough without it. This is far short of the direct admissions in *Reed v. Reed*, and the court below rightly held that it was insufficient to overcome a presumption of payment arising from lapse of time. When a person in conversation with a stranger respecting the claim of another, says he will not pay it, there is not the same reason for inferring recognition that exists when the creditor requests and the debtor refuses payment. In the latter case not to deny is to admit. Besides, the debt is claimed. But it does not concern the stranger whether the claim is existing or has been paid; he has no right to ask payment.

The executor lived almost twenty years after the legacy became due and payable. It was not claimed by the legatee for more than twenty-

one years after it was due. The debt was unrecognized and unclaimed for over twenty years, and the time of payment is deemed to have been before the beginning of the period, else payment would not be presumed. Were the debtor living the reason for invoking the presumption would not be so strong as now, for his representatives are not so likely to know of the actual evidence of payment as he would be. The difficulty of proving a fact which occurred many years before its existence is questioned, lies at the foundation for its presumption from lapse of time. Then the mere fact of the debtor's death ought not to be a sufficient explanation of the creditor's delay. Immediately he may make claim against his debtor's estate. The case differs from one where the debtor was in extreme poverty, or beyond sea. And if the debtor be a trustee he may avail the rule respecting stale demands, though he could not the statute of limitations: *Power v. Hollman*, 2 Watts, 218. In that case the court, conceding that claims against an insolvent who had assigned his property in trust for creditors, would not be barred by the statute, ruled that lapse of time would raise a presumption of their payment.

We are of opinion that the presumption of payment of the appellee's claim had arisen before the presenting of her petition.

Decree reversed, and the exceptions to the adjudication by the accountant sustained, costs to be paid by the appellee, Ann E. Daly.

For appellant, John G. Johnson, Esq.

Contra, R. P. White, Esq.

MILNE'S APPEAL.

The Orphans' Court has power to revise and correct its adjudications if it discover a palpable mistake produced by its own inadvertence or the blunder of the parties.

In a distribution in the Orphans' Court an administrator cannot retain from a distributee his indebtedness to the intestate, which is barred by the statute of limitations.

The statute begins to run on a note payable on demand from its date, and no demand is necessary before suit brought.

The running of the statute is not suspended by proceedings in bankruptcy against the debtor.

Appeal from the decree of the Orphans' Court of Philadelphia county.

Opinion by GORDON, J. Filed February 20, 1882.

The appellant, Francis F. Milne, is a creditor of A. J. Bucknor, Jr., and on the 21st of January, 1878, levied two writs of attachment on the distributive shares of the debtor in the hands of William A. James, administrator of the estate

of A. J. Bucknor, Sr., and it is thus that Milne becomes interested in the distribution of this estate and in the decree made by the court below. On settlements of the accounts of the administrator, the last one audited January 21, 1879, the distributive shares of the younger Bucknor were found to be \$17,129.72, and so adjudged. At the time of the death of A. J. Bucknor, Sr., which occurred December 13, 1877, he held two several claims against his son; one a due bill, payable on demand, for \$10,000, dated January 1, 1867; the other a claim against the firm of Bucknor, McCammon & Co., made up of a note for \$3,395.46, due October 5, 1870, and an account for money loaned in the sum of \$9,807.93, due September 12th of the same year. This firm went into bankruptcy October 14, 1870, from which, as yet, there has been no discharge, and the claim above stated was, among others, duly proved. On the settlements in the Orphans' Court, through some inadvertence or mistake, the effect of these claims, as offsets to the distributive shares of the younger Bucknor, was not passed upon, and on a petition of the administrator, dated June 21, 1879, setting forth this mistake, which is not denied, the court opened its former decree and proceeded to a readjudication. To both the above mentioned claims against A. J. Bucknor, Jr., the appellant interposed the plea of the statute of limitations, which was overruled by the Orphans' Court, and the set-off as claimed by the administrator was allowed. We have, therefore, two principal questions presented for our consideration; the power of the Orphans' Court to open and correct its decree, and the effect of the statute of limitations upon the claims of the estate against A. J. Bucknor, Jr.

As to the first question, we answer it by saying that we have no doubt about the power of the Orphans' Court to revise and correct its former adjudications, if in those adjudications it discovered a palpable mistake, produced either by its own inadvertence or by the blunder of the parties. A sense of fair dealing and justice would be authority enough, in the absence of any other, for so holding; nevertheless, other authority will be found, and that directly in point, in *George's Appeal*, 2 Jones, 260, where the subject is so fully discussed, that further argument from us is unnecessary.

This out of the way, next in order comes the question involving the statute of limitations. If this statute is operative under the circumstances of this case then both the claims above referred to are barred thereby, and the appellant is entitled to a reversal of the decree of the court below. But, as we have seen, if it is not

operative, it is not for the want of time, for the due bill as well as the claims against Bucknor, McCammon & Co. were more than six years old at the time of the death of the elder Bucknor.

But it is urged that the statute does not apply to a distribution in the Orphans' Court where there is an exercise of the right to retain from a distributee's share his indebtedness to the estate. To support a doctrine such as this, nothing has been produced from our own books, but the dictum of Mr. Justice REED, in *Thompson's Appeal*, 6 Wright, 346, and that is based solely on English authorities. On the other hand, the contrary was held in the recent case of *Reed v. Marshall*, 9 Norris, 345, where, on a suit for a legacy, an attempt was made to set off a claim of the estate against the legatee which had been barred by the statute prior to the death of the deceased.

Nor is the attempted distinction between equitable and common law proceedings as respects the statute of limitations well founded. As was said in *Hoch's Appeal*, 9 Harris, 280, a case where the Orphans' Court, on objection of a legatee, refused to allow an executor to retain a debt due himself which was barred by the statute in the life of the testator, a court of equity will not pass upon a claim bad at law. Neither has the argument for a contrary doctrine a sound premise. It is urged that the statute does not pay the debt; that it only operates on the remedy. It is true that the statute operates only upon the remedy, or action for the collection of the debt; but it thus operates because of the presumption that the claim has been paid or otherwise extinguished, if its collection has not been insisted on within six years, and that, therefore, it would be inequitable after that time to compel its payment: *Hanger v. Abbott*, 6 Wallace, 588.

Again, the court below thought that as the ten thousand dollar claim was a due bill, payable on demand, the statute did not commence to run from its date, but only after demand made. This was a mistake. *Taylor v. Witman*, 3 Grant, 138, holds that the statute begins to run, on a note payable on demand, from its date, and that no demand is necessary before suit brought. The cases of *The Girard Bank v. The Penn Township Bank*, 3 Wright, 92, and *Finckbones' Appeal*, 5 Norris, 362, are not in point. Those were suits for the recovery of deposits, and the contracts were in the nature of bailments for safekeeping; moreover, in the case last named, it was expressly said that the obligation sued upon was not in the nature of a due bill, but that it had rather the character of a deposit.

As to the claim against Bucknor, McCammon & Co., we cannot agree with the court below that the running of the statute was suspended by the operation of the United States Bankrupt Act. The probate of the claim under that act is like the prosecution of any other suit; if it is successful, all is well, and the account is secured; but if not, if the creditor is in the end obliged to resort to a new process in the State courts for the recovery of his debt, we cannot see upon what principle, in order to avoid the running of the statute of limitations, he can count out the time consumed by his first abortive attempt. He is not compelled to prove his claim; but if he does, it is a voluntary surrender of it, and in this it is altogether unlike those cases where a condition of war, as in *Hanger v. Abbott*, *supra*, or public policy, as in *Hutchinson v. The Bank*, 5 Wright, 42, leaves the creditor without remedy. But under such circumstances his will is not consulted; the courts are closed against him. Hence, of necessity, the running of the statute is suspended until the public emergency has passed, and he is again clothed with power of asserting his rights. In the case now being considered, Bucknor had two methods of redress presented for his consideration and acceptance. He might prove his claim in the Bankrupt Court, or he might sue in the State court. If he adopted the first method, he voluntarily abandoned all other remedies, and made an absolute surrender of his claim; and it is only by virtue of the Act of Congress of June 23, 1874, that he could be restored to his former condition, in case a discharge was refused to the bankrupt or the proceedings were determined without a discharge.

Now Bucknor's claim against the firm of which his son was a member was proved some seven years before his death, and had there been no unwonted delay a discharge would have been had long before the date of his decease. But, in that event, the indebtedness now sought to be used as an offset would have been fully cancelled, and the use of it as now intended, against the after-acquired estate of the younger Bucknor, would have been out of the question. But as yet there has been no discharge, neither have the proceedings in bankruptcy been determined without a discharge; hence the Act of 1874 does not apply to the claim in controversy, and it may be that it never will so apply.

How then can this surrendered claim be interposed as a set-off, or must the distribution await indefinitely for the happening of a contingency, now rendered exceedingly remote by the death of both the principal parties? We

think it will not subserve the purposes of either law or equity thus to suspend the running of the statute on the mere expectation of an event that may never come to pass. If, however, the second method were adopted, the bar of the statute would be effectually prevented, and the creditor might prosecute his claim to judgment, subject only to such delays as might result from the interposition of the court, having jurisdiction of the proceedings in bankruptcy.

We conclude, then, that the delay in this case having arisen from no legal or political necessity, but from the voluntary act of the creditor, the bar of the statute is effective to defeat the appellee's claim.

The decree of the court below is now reversed and set aside, and the former adjudications restored and affirmed at the costs of the appellee.

For appellant, *M. Arnold, Esq.*

Contra, Samuel Gustine Thompson, Esq.

ADDRESS' APPEAL.

The statute of limitations runs upon a due bill payable "on demand" from its date.

The words "on demand" do not make the demand a condition precedent to a right of action, but import that the debt is due and demandable immediately.

Appeal from the decree of the Orphans' Court of Philadelphia county.

Opinion by MERCUR, J. Filed March 21, 1882.

At what time is a due bill payable on demand barred by the statute of limitations? Does the statute begin to run at its date, or not until payment is demanded? It is a well recognized rule of law that the statute begins to run on a promissory note, whether negotiable or not, whenever a cause of action accrues thereon; that is, from the time the holder has a right to demand the thing claimed: *Bucklin v. Ford*, 5 Barb., 393; 2 Parsons on Notes and Bills, 641-2. The words "on demand" in a note do not make the demand a condition precedent to a right of action, but import the debt is due and demandable immediately, or at least that the commencement of a suit therefor is a sufficient demand: Byles on Bills, 342; *Taylor's Adm'rs v. Witman's Adm'rs*, 3 Grant, 138; *Milne's Appeal*, 29 PITTSBURGH LEGAL JOURNAL, 397. A promise in writing to pay a note "at any time within six years from this date," was held a promise to pay on demand, and the statute ran from its date: *Young v. Weston*, 39 Maine, 492. The attempt was made on the argument to subject this due bill to the rule applicable in case of a promise to return specific property or securities on demand, as in *Finkbone's Appeal*, 5 Norris, 368, and of a deposit in bank, as in *The Girard Bank v. The Bank of Penn Township*, 3 Wright,

92. The due bill now in question does not admit the application of that rule. It reads, "due William Address four hundred dollars, payable on demand." It was signed by the appellant's testator, and dated August 1, 1867. The maker died on the 16th of May, 1879. Thus he lived nearly twelve years after the statute began to run against the claim. The payee died in November, 1870, and letters of administration on his estate were granted on the 18th of January, 1871. So there was a party to sue as well as one to be sued. As, then, the due bill was barred by the statute long before the maker thereof died, the appellants did not take or hold any of the assets of his estate in trust for its payment. There was no evidence of any promise of payment other than that contained in the due bill, nor of any demand for payment until it was presented for payment at the audit, March 8, 1881. The statute of limitations was then interposed, and the learned judge erred in not disallowing the claim.

Decree reversed, the exceptions to the allowance of the claim are sustained, and it is ordered that distribution be made conformably with this opinion.

For appellants, *Messrs. Albert L. Wilson and John G. Johnson.*

Contra, George Junkin, Esq.

FRIES v. PENNSYLVANIA RAILROAD CO.

A judgment obtained in the Common Pleas in favor of the plaintiff, which has been reversed on writ of error by the Supreme Court without awarding a *venire factas de novo*, is not a bar to a new suit between the same parties for the same cause of action.

The fact that the judgment in the court below was obtained after a trial on the merits and a verdict for the plaintiff, does not vary the effect of a judgment of reversal as above stated.

Error to the Court of Common Pleas of Blair county.

Case for negligence by Fries against the Pennsylvania Railroad Company to recover the value of goods burned at Osceola while in transit over the defendant's railroad. The defendant filed a special plea, averring that the plaintiff had brought a former action in the Common Pleas of Blair county for the same cause of action, in which, after a trial upon the merits, the plaintiff recovered a verdict and judgment, that upon a writ of error the Supreme Court reversed the judgment without awarding a *venire facias de novo*; and the said court subsequently discharged a rule to show cause why a new *venire* should not issue. See *Penn'a Railroad Co. v. Fries*, 5 W. N., 545, and *Same v. Same*, 7 Id., 433.

Demurrer to special plea.

The court overruled the demurrer and entered judgment thereon for the defendant. The plaintiff took this writ, assigning for error the entry of judgment for the defendant on the demurrer.

For plaintiff in error, *Messrs. S. S. Blair, Alexander and Herr.*

Contra, Messrs. L. W. Hall and D. J. Neff.

Opinion by MERCUR, J. Filed October 3, 1881.

This contention arises on what effect is to be given to a former judgment between the same parties and for the same cause of action? In the former case a general verdict was found in favor of the plaintiff and judgment was entered thereon. On error by the defendant to this court that judgment was reversed, but a *venire facias de novo* was refused. This suit was brought in less than one year thereafter for the same cause of action. The question is whether the former judgment is a bar to this last action? The court below held it was, and on demurrer to a plea thereof, entered judgment in favor of the defendant.

In 3 Bac. Abr. 386, it is said, "if judgment be given against the defendant, and he bring a writ of error upon which the judgment is reversed, the judgment shall only be *quod judicium reverteretur*, for the writ of error is brought only to be eased and discharged from that judgment."

The power of the court to award a *venire* in case of a reversal of the judgment is now settled. It was so held in *Sterrett v. Bull*, 1 Binn., 238, and we are not aware that the power has since been questioned. The exercise thereof is controlled by the character of the case and the sound discretion of the court.

A judgment of reversal without a *venire* is not such a final judgment that an execution can issue thereon for the collection of costs: *Smith v. Sharp*, 5 Watts, 292. The effect of such a judgment was considered in *Mercer v. Watson*, 1 Watts, 330. It was a judgment by this court, in case of a general verdict and judgment, on error by one who had recovered against the same party for the same land and on the same title, yet the two judgments were held insufficient to bar another action of ejectment by the other party. In delivering the opinion of the court, Mr. Justice KENNEDY said: "A judgment merely reversing the judgment of the court below, rendered on a general verdict, may be, and often is, for a cause that does not ultimately vary or change the final determination of the case. * * * It may furnish some ground to presume that the party against whom the

writ of error was sued out, or the court, or both, if you please, thought that from the nature of the case that had been declared, a *venire facias de novo* would not be likely to be available to the defendant in error, but not to prevent absolutely his bringing a new action, in case he should afterwards change his mind or discover that he can supply what was wanting before, or in any way overcome the difficulty or objection then interposed to his recovery."

In personal actions the right of a party to commence a new suit, after the reversal of a prior judgment in his favor for the same cause of action, is distinctly recognized by the Act of 27th March, 1713, 1 Smith's Laws, 76. Section 2 declares, "If in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict passed for the plaintiff and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his plaint, writ or bill, then, and in every such case, the party plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed or given against the plaintiff aforesaid and not after."

The present action is of the kind referred to in the statute, and it was brought within a year after the reversal of the former judgment.

It is true in *Gibbs v. Bartlett*, 2 W. & S., 29, it was held the reversal of a judgment in replevin, without a *venire*, was conclusive as to the liability of the surety in the replevin bond, conditioned that the plaintiff "prosecute the suit with effect and without delay;" yet as said by the present Chief Justice, in commenting on that case in *Coleman's Appeal*, 12 P. F. Smith, 252, "it is by no means clear that a simple judgment of reversal in a court of errors is such a final judgment as to have the effect of an estoppel," citing *Aurora City v. West*, 7 Wallace, 92. Neither the Act of 1713 nor the case of *Mercer v. Watson* were noticed. We think the case of *Mayer v. Walter*, 14 P. F. Smith, 283, properly understood, is not in conflict with the conclusion at which we have arrived.

When the case between these parties was previously here, we held the facts proved gave no cause of action. The judgment of reversal then rendered was a declaration of the law on that evidence. If on another trial the evidence shall be substantially the same it will be the duty of the court to apply the law as we then declared it. That judgment, however, is not a legal bar to the present action.

Judgment reversed and procedendo awarded.

LEBANON NATIONAL BANK v. KARMANY.

State courts have jurisdiction under the provisions of the Act of Congress of February 18, 1875, in an action by a borrower against a national bank to recover the penalty imposed by the Revised Statutes of the United States, Sec. 5197, upon such banks for taking usurious interest.

Bletz v. Columbia National Bank, 6 Norris, 187, followed.

Under said act State courts have jurisdiction where the right of action accrued prior to the passage of the act as well as after.

There are no banks of issue nor have there ever been any such banks in Pennsylvania authorized to take and receive interest at a greater rate than six per cent. The Act of May 23, 1878, P. L., 109, expressly subjecting all banking corporations to the usury law of May 28, 1858, P. L., 622, was passed merely to remove any ground for fictitious claims to that effect, and gave no validity or sanction to such claim previously made.

It is not allowable in Pennsylvania to take or receive a higher rate of interest than six per cent., hence a national bank is not justified in taking such higher rate by virtue of the provisions of the Revised Statutes of the United States, Sec. 5197, authorizing such banks to charge interest at the rate allowed by the State where the bank is situate.

Where a national bank takes usurious interest, the debtor is entitled immediately on payment of the same to bring suit for the recovery of the penalty provided by the Revised Statutes of the United States, Sec. 5198, even though the indebtedness on which the usurious interest was charged may not have been paid at the time of suit brought.

In such action the plaintiff is entitled to recover back twice the total amount of interest paid, not only twice the amount of the excess over the lawful interest.

Crocker v. First National Bank of Chelapa, 3 Cent. L. Jour., 527, followed.

Said action being a penal action, defendant cannot set off therein a judgment held by him against plaintiff.

Where a declaration clearly sets forth the cause of action and the matters claimed, objections for defects in form made after verdict will not avail.

The necessary allegations in and form of a declaration filed in an action against a national bank to recover the penalty imposed by the Revised Statutes of the United States, Sec. 5198, for taking usurious interest, discussed and passed upon.

Error to the Court of Common Pleas of Lebanon county.

Debt by David M. Karmany against The Lebanon National Bank to recover the penalty prescribed by the Act of Congress (Rev. Stat. of United States, Sec. 5198), for taking usurious interest.

The declaration contained a single count claiming for double the sum of various amounts of interest alleged to have been taken and reserved on specified days between January 21, 1874, and July 24, 1875, on the loan or discount of various specified sums for specified periods, the excess of each amount over the legal rate of interest being set forth. The total amount claimed was \$3,960.24.

Defendant pleaded *nil debet*, also a special

plea to the jurisdiction of the court, also a special plea setting forth that there were in existence twenty-three several banks (naming them) organized under the laws of Pennsylvania, and having power to issue circulating notes, who were authorized to take and receive such rates of interest as might be agreed upon by the parties contracting with them, all of which banks were organized, and had carried on business before January 1, 1874. The acts incorporating the several banks referred to were annexed to the plea. Defendant also filed a special plea of set-off, specifying two several judgments, the one for \$326.18, the other for \$6,000, held by it against plaintiff.

On the trial, before HENDERSON, A. L. J., it appeared that the usurious interest in question was at the rate of eight per cent., and was charged and received by defendant upon the discount of promissory notes and drafts for plaintiff. Two of these notes, one for \$7,500, and the other for \$6,000, remained unpaid at the time of the trial.

Defendant offered in evidence under its special plea of set-off the judgments held by it against plaintiff. Objected to on the ground that a penalty for a breach of statute is not, when sued on, within the defalcation acts, nor subject to any manner of set-off. Objection sustained. Offer rejected. Exception.

Defendant presented, *inter alia*, substantially the following points:

The court had no jurisdiction in the case. Congress has no right to confer on State courts jurisdiction to recover penalties incurred under a statute of the United States without concurrent legislation on the part of the State, and no such legislation has been had on the part of this Commonwealth. Even if Congress can confer such jurisdiction there can be no recovery in this case for any penalties incurred prior to the passage of the Act of February 15, 1875, whereby such jurisdiction was conferred. *Answer.* "This is an action to recover twice the amount of interest paid, under the 5198th Section of the Revised Statutes of the United States, and is an action to recover a penalty * * * We are of opinion * * * that the State courts have jurisdiction, and that the plaintiff may recover the full penalty, twice the amount of interest paid, for a violation of said Section 5198."

There being banks in the State which are banks of issue within the meaning of Section 5197 of the Revised Statutes of the United States, which banks are authorized to take and receive more than six per cent. interest by the terms of their respective charters, it was not unlawful for the defendant to take a greater rate of inter-

est than six per cent., and no penalty was incurred by it in this case for so doing. *Answer.* Refused. "It does not appear that the banks named are banks of issue, having a right to charge a rate of interest greater than six per cent. per annum, and in fact and in law there is no bank of issue in Pennsylvania authorized to charge a rate of interest in excess of the legal rate."

While the legal rate of interest is six per cent. the Act of Assembly permits parties to contract for and take a greater rate, viz., such rate of interest as may be agreed upon. Therefore it was allowable for defendant to agree with plaintiff to take more than six per cent. interest, and the defendant is not liable in this action. *Answer.* "There is nothing in the statute allowing parties to contract in reference to the rate of interest as therein provided, which authorizes banks to take, reserve or charge a rate of interest or discount in excess of the legal rate, which is six per cent. per annum."

No action will lie for the recovery of the penalty or penalties provided by Section 5198 of the Revised Statutes of the United States until payment of the notes on which it is alleged that usurious interest was taken by the bank, and therefore there can be no recovery in this action except when the evidence shows that the notes were paid. *Answer.* Refused.

If a recovery can be had in this action no more can be recovered than twice the amount of the interest paid in excess of the legal rate. *Answer.* Refused.

If the plaintiff can maintain this action the defendant is entitled to set off any dues or demands, whether in judgment or otherwise, it may hold against the plaintiff. *Answer.* "There can be no set-off in this action."

The court charged the jury, *inter alia*, as follows: "It is for you to find the amount of interest charged on these several loans and discounts, and if in excess of the legal rate, which we instruct you is six per cent. per annum in Pennsylvania, the plaintiff is entitled to recover from the defendant twice the interest thus paid. There can be no recovery for usurious interest paid on any contract or note not declared on."

Verdict for the plaintiff in the sum of \$3,526.98.

Defendant moved for a new trial and in arrest of judgment. The motion for a new trial was subsequently withdrawn. The following were the reasons filed in arrest of judgment: Because the declaration did not set out the Act of Congress nor any violation thereof in sufficient terms; because it did not aver the jurisdiction of the court nor conclude *contra formam statuti*; because it contained no separate count for each

penalty claimed; because there was a variance between the amount claimed in the declaration and the amount found by the verdict; because the declaration failed to specify the dates and amounts of the various notes and drafts on which the discounts and loans were made, and also the time they had to run, and finally because the declaration alleged a violation of the Act of Congress as to loans and discounts, whereas the proof showed that it had been as to promissory notes and drafts.

The following was the opinion of the Court, HENDERSON, A. L. J., on the motion in arrest of judgment:

"The motion for a new trial has been withdrawn; we shall briefly dispose of the motion in arrest of judgment. The declaration is sufficiently formal, and clearly and distinctly sets out the cause of action. It has substance; even if defective in or for the want of formal averments, it was amendable, and is cured by the verdict or may still be amended so as to conform to the evidence and supply any mere technical defect. This court has jurisdiction, and of this we take notice, it is not necessary to plead it formally, and if it was, the jurisdiction is apparent, and in this no reason exists for an arrest of judgment. It is trifling to say there was no proof of the Act of Congress. It is the law of the land of which we may well take notice, but it was before court and jury from the first to last so fully and clearly that it would have been useless to make a note of it or call for proof. There is no necessity for more than one count; the action is debt, the cause of action is clearly stated; it is sufficiently certain for an indictment if the taking of usurious interest had been made an indictable offense. There is no variance between the verdict and the claim set out in the *narr*.

"This is not an action for a fixed and definite penal sum, it is an action to recover a penalty which is determined by the amount of interest or discount paid and received, and necessarily requires some calculation, and a mere discrepancy in a date or amount, depending on the testimony in the cause, is not such a variance as defeats the action; this may be amended before or after verdict. There is no substance or merit in any of the reasons assigned, the truth is manifest that a large amount of usurious interest has been taken and received by the defendant from the plaintiff, and to whittle away the rights of the plaintiff under the law by sharp and severe technical points of pleading after verdict is a denial of justice. We overrule the motion in arrest of judgment."

Judgment accordingly on the verdict.

Defendant thereupon took this writ, assigning for error, *inter alia*, the rejection of its offer of evidence, the answers to its various points above cited, and the overruling of the motion in arrest of judgment.

For plaintiff in error, *Messrs. Grant Weidman and C. P. Miller*.

Contra, W. M. Derr, Esq.

Opinion by TRUNKY, J. Filed June 20, 1881.

In the twenty-eight points presented to the court below, and in the more than thirty assignments of error, no question is made but that the plaintiff paid and the defendant received a large amount of usurious interest. That fact was too patent to be gainsaid. The court submitted to the jury to find the amount of interest charged on the several loans and discounts, and if in excess of the legal rate, with instructions that there could be no recovery for usurious interest paid on any contract or note not declared upon. The submission, involving the merits of the case, is not specified among the alleged errors.

The numerous assignments do not present so many points, and some of these do not seem to be so material as to require remark. In passing, it may be noted that the statutes in this State providing for amendments in pleadings are very liberal, even permitting the courts to allow the filing of a declaration or plea after verdict, and these statutes have been liberally construed as remedial. When a declaration clearly sets forth the cause of action and the matters claimed, objections for defects in form will not avail as formerly.

The defendant denied the jurisdiction of the court. In *Bletz v. Columbia National Bank*, 6 Norris, 87, it was decided that State courts have jurisdiction in an action by a borrower against a national bank, to recover back twice the amount of illegal interest paid by the borrower to the bank, and taken in violation of the National Bank Act. That was the point in the case. Since, the judgment has been repeatedly followed, without attempt to add to the reasoning of AGNEW, C. J., who supported it independently of the Act of February 18, 1875, amending Section 5198 of the Revised Statutes of the United States. No sufficient reason appears for departure from the authority of that case. Moreover, said amendment expressly gives jurisdiction in said action to the State courts, and as it is purely remedial, it might be construed to apply where the action accrued prior to its date as well as after.

The defendant asked instructions that the

banks named in the special plea are banks of issue under the laws of this Commonwealth, within the meaning of Section 5197 of the Revised Statutes of the United States, to which the court answered: "It does not appear that the banks named are banks of issue, having the right to charge a rate of interest greater than six per cent. per annum. And in fact and in law there is no bank of issue in Pennsylvania authorized to charge a rate of interest in excess of the legal rate." This ruling was in accord with the opinion of AGNEW, C. J., in *First National Bank of Clarion v. Gruber*, 6 Norris, 468, and with the subsequent decision of this court in the same case (27 PITTSBURGH LEGAL JOURNAL, 50). At the second trial nearly all the same charters were pleaded as in this case. It is not alleged that these banks ever did issue circulating notes. It was not the legislative intention that they should have that right. Until their charters were construed to give it by national banks, it was not suspected that such power had been granted. At the first session of the Legislature, after the the national banks had set up this construction in court, a statute was enacted subjecting all banking corporations to the Act of May 28, 1858, relating to interest for the loan or use of money. It was well to remove any ground for said fictitious claims, and in doing so, no validity or sanction was given those which were previously made.

In answer to the defendant's twelfth and thirteenth points, the jury were instructed that nothing in the statutes of this Commonwealth, relating to the rate of interest, authorizes banks to take, reserve or charge a rate of interest in excess of six per cent. per annum. The statute provides, "the lawful rate of interest for the loan or use of money in all cases where no express contract shall have been made for a less rate shall be six per cent. per annum." When a greater rate shall have been reserved or contracted for, the debtor shall not be required to pay the excess over the legal rate, and at his option he may deduct the excess from the amount of the debt, or when he shall have voluntarily paid the whole debt with interest, exceeding the lawful rate, he may recover the excess of interest by action: Act of May 28, 1858, P. L., 622. This statute inflicts no penalties for charging or receiving unlawful interest, and it has been said that it is not unlawful for a debtor to pay, or a creditor to receive, more than the lawful rate, and that the man who agrees to pay more, commits no violation of law, and it is not bound to repudiate his contract: *Appeal of Second National Bank of*

Titusville, 4 Norris, 528. It is strictly true that no violation of law is committed in the making of such contract that will be followed by pains and penalties or forfeitures; or that such contract will be deemed a fraud upon other persons, and the remarks were to the end that the taking of more than six per cent. interest is not a fraud *per se* upon creditors. In another sense, the contract for a greater rate of interest than six per cent. is in violation of law. In absence of a contract for a less rate, the plain letter of the statute is six *per centum* per annum is the lawful rate of interest, and if the parties contract for a greater rate the contract is voidable as to the excess, the debtor need not pay the excess, and if he pay the excess voluntarily, he may recover it back by action. The court was clearly right in the instruction as to the rate of interest banks may receive or charge on loans and discounts.

It is alleged that the court erred in refusing the defendant's points that no recovery can be had for the penalty under Section 5198 unless the debt also was paid. The section is, "the taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in the nature of an action of debt twice the amount of the interest thus paid, from the association taking or receiving the same." "Two categories are thus defined and the consequences denounced: 1. Were illegal interest has been knowingly stipulated for, but not paid; then only the sum lent without interest can be recovered. 2. Where such illegal interest has been paid; then twice the amount so paid can be recovered in a penal action of debt, or suit in the nature of such action against the offending bank brought by the persons paying the same or their legal representatives:" *Barnet v. National Bank*, 8 Otto, 555. The terms of the statute are too plain for different constructions. If illegal interest be contracted for, the debt shall bear no interest. If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intentment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest, when sued for the penalty, to chop round and

call it a credit on the principal, would vitiate the vindictory clause of the statute. In such cause the taking would amount to nothing more than a contracting to receive. The statute inflicts twice the penalty for taking that it does for contracting: *Monongahela National Bank v. Overholt*, 38 *Legal Intell.*, 185. In Pennsylvania the statute authorizes the debtor at his option to deduct the excess of interest from the debt or to pay the whole debt and unlawful interest and then recover back the excess over the lawful. Such statutes and decisions under them throw no light on the question now pending.

It is urged that the court erred in refusing the defendant's point that no more can be recovered than twice the amount of the interest paid in excess of the legal rate. The statute makes the receiving or charging "a rate of interest greater than is allowed" "a forfeiture of the entire interest." "In case the greater rate of interest has been paid," the debtor may recover back "twice the amount of interest thus paid." The bank may take or charge the "rate" allowed by the laws of the State where it is located, and if no "rate" is fixed by said laws, it may take or charge a "rate" not exceeding seven *per centum*. It is clear the word rate is used in the same sense throughout. The lawful rate or measure is certain, and a greater rate, whatever it may be, is a fixed measure by agreement of the parties. The entire interest forfeited is just the rate which was contracted. Upon payment and receipt of a greater rate than is lawful, twice the amount thus paid is twice the rate, twice the entire interest. To say that the meaning is, only a part of said greater rate, only the excess over the lawful rate may be taken to measure the penalty, is a wresting of the words. The defendant cites and relies on the case of *Hinterminster v. First National Bank of Chittenango*, 64 N. Y., 212, where it was decided that only twice the amount paid in excess of the lawful interest can be recovered. Great weight is justly given to the decision of that court, but in this case we think its reasoning and conclusion are directly at variance with the statute. We adopt the ruling of DILLON, Cir. J., of U. S., that the amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate: *Crocker v. First National Bank of Chetopa*, 3 *Cent. L. Jour.*, 527.

In answer to the defendant's twenty-seventh point, the court charged that there can be no set-off in this action. The plaintiff's claim is not within the Defalcation Act, which applies

where the parties are "indebted to each other upon bonds, bills, bargains, promises, accounts or the like." It arises from the defendant's violation of a statute, remedial and penal, which gives the borrower the right to recover back from the bank twice the amount of illegal interest paid, for the twofold purpose of compensation and example, the recovery being a recompense to the one and a punishment of the other: *Monongahela National Bank v. Overholt*, *supra*. It was decided in *Barnet v. National Bank*, 8 Otto, 555, that in an action on a bill of exchange, the defendant could not set off a claim for twice the amount of illegal interest he had paid the bank, that his remedy for the wrong was a penal suit, and he could have redress in no other mode or form of procedure. That set-off is not allowed in such actions is well settled. When the prescribed action for recovery is debt or action in the nature of debt, it gives no right of set-off. After the plaintiff shall have obtained judgment, if the defendant have a judgment against the plaintiff in another case, there is power in the court to order one judgment to be set off against the other, governed by equitable principles. But such principles do not apply in a suit where the claim is in the nature of a penalty for violation of a statute so as to allow defalcation.

Nothing need be added to the opinion of the learned Judge of the Common Pleas wherein he gave his reasons for denying the motion in arrest of judgment. *Judgment affirmed.*

Court of Common Pleas, No. 2.

MRS. SARAH McINTYRE v. JACKSON STEWART.

A testator bequeathed to his daughter Mary, *inter alia*, fifteen dollars per year to be paid to her by his son William. Then follow two pecuniary legacies to his daughters, Elizabeth and Sophia. The will then reads as follows: "The balance of my estate, real and personal, I give and bequeath to my son William after his settling my accounts and paying the above legacies." *Held*, that the annuity of fifteen dollars per year to Mary was charged upon the land devised to William. The plaintiff, who was the owner of a portion of said land, having paid the whole of said annuity, brought suit before a justice of the peace to recover contribution from the defendant, who was the owner of another portion of said land. *Held*, that the justice had jurisdiction.

This was an appeal by the defendant from the judgment of a justice of the peace. On the trial the facts were found to be as follows: Samuel Ross died, leaving his last will and testament, dated 17th November, 1854, in which he be-

queathed to his daughter, Mary Ross, *inter alia*, "fifteen dollars per year to be paid to her by my son William." The will then read as follows: "One acre of ground to be included in and with the house to Mary, and seventy-five dollars to my daughter Elizabeth, and seventy-five dollars to my daughter Sophia. The last two legacies to be paid at the end of one year after my death. The balance of my estate, real and personal, I give and bequeath to my son William after his settling my accounts and paying the above legacies." In 1862 William Ross conveyed to Thomas W. Stewart thirty-four acres of the land devised to him under the will of his father, Samuel Ross. In 1864 Thomas W. Stewart conveyed the same land to George L. McIntyre, who in 1873 conveyed to Jackson Stewart, the defendant, a portion of said land, viz., twenty acres and thirty-eight perches. George L. McIntyre died in 1874, leaving his will, dated 13th June, 1874, in which he devised to his wife, the plaintiff, the balance of said thirty-four acres during her natural life.

The plaintiff proved that at the time Jackson Stewart purchased his portion of the land, he agreed to pay the one-half of said legacy of fifteen dollars per year to Mary Ross. That he actually paid the same for the years 1874, 1875, 1876, 1877, 1878; that then Mary Ross having been removed to the Allegheny County Home at Woodville, the said defendant refused to pay any longer; that the superintendent of the home having threatened to look to Mrs. McIntyre, the plaintiff, for the whole of said legacy, she paid the same for the years 1879 and 1880 and then brought suit before the justice to recover from the defendant the portion of the legacy which he should have paid.

The defendant moved for judgment of compulsory nonsuit, which was refused.

The Court, WHITE, J., charged the jury as follows: "If the jury find from the evidence that the defendant, Jackson Stewart, at the time he purchased from George L. McIntyre in 1873, agreed to pay one-half the legacy of Mary Ross and take the land he purchased subject to the said charge, that is, of \$7.50 a year, during the life of said Mary Ross, and for the year 1874 paid that sum to George L. McIntyre, and for the years 1875, 1876, 1877 and 1878 paid the same to his widow, the present plaintiff, for the purpose of paying his share of said legacy, and if the jury further find that the plaintiff paid the whole of the legacy for the years 1879 and 1880, after demand and notice if not paid suit would be brought, the plaintiff is entitled to recover the amount claimed in the action, to wit, \$15 with interest thereon from April 1, 1881. The

verdict, however, to be subject to the opinion of the court in *banc* on the questions of law reserved, to wit:

"1. Whether the magistrate had jurisdiction in this case.

"2. Whether under the will of Samuel Ross the land devised to William Ross was charged with the payment of the annuity of fifteen dollars to Mary Ross."

April 3, 1882. Verdict for plaintiff for \$15.90, subject to questions of law reserved as aforesaid.

The reserved questions of law were argued May 4, 1882, before the court in *banc*.

For plaintiff, Charles Young, Esq.

The justice had jurisdiction inasmuch as the title could not come in question: Act of March 20, 1810, Purdon, 848; *Camp v. Walker*, 5 Watts, 482; *Bell's Executor v. Bell*, 8 Casey, 309. The legacy, if not expressly charged on the land, was charged by implication of law from the fact that the testator blends his real and personal estate together in the residuary clause of his will: *Bank v. Donaldson*, 7 W. & S., 407; *Gallagher's Appeal*, 12 Wright, 121; *Wertz' Appeal*, 69 Pa. St., 173.

Contra, H. T. Watson, Esq.

The justice has no jurisdiction where the title to land may come in question: *Goddard v. McKean*, 6 Watts, 337; *Lee v. Dean*, 3 Rawle, 325. The judgment in this case would be "*de terris*" and a justice has no jurisdiction to collect such a judgment: 3 R. 183; 57 Pa. St. 126; 12 Wright 491.

Opinion by WHITE, J. Filed May 20, 1882.

I have no doubt the land devised to Wm. Ross, under the will of his father, was charged with the payment of the legacy to Mary Ross. The suit before the justice was not to enforce the payment of a legacy. The defendant had agreed to pay one-half the annuity of Mary Ross. It was a charge upon the land of both plaintiff and defendant. Plaintiff paid the whole under compulsion, and with notice to defendant that she would look to him for one-half, she brought suit before the justice to compel payment. I think the justice had jurisdiction. I cannot see how, in any aspect of the case, the title to the land could come in question in this action, which was by Mrs. McIntyre. The covenant of warranty in the deed to Jackson Stewart was the covenant of George L. McIntyre, for he was the owner of the property. Mrs. McIntyre is not liable personally on that covenant. On both questions, then, we think the law is with the plaintiff.

On payment of verdict fee let judgment be entered for plaintiff on the verdict.

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PITTSBURGH, PA., JUNE 28, 1882.

Supreme Court, Penn'a.

RIGHTER, COWGILL & CO. v. THE WAREHOUSE COMPANY.

Where a company organized for the purposes of advancing money and credits upon bills of lading or warehouse receipts charges for its services in regard to the collateral pledged, and also for discounting its own note advanced, a sum more than six per cent., it is not usury, and the court below were right in saying that no question of usury could arise out of the discount or on account of the payment for services when it is undisputed that services were rendered. Upon default of the pledgors, the pledgees, according to agreement, had a perfect right to sell the collateral and receive their commissions as set forth in the agreement, and also reasonable expenses. It was properly left to the jury to find whether the commissions charged for selling the collateral were reasonable or not.

Error to the Court of Common Pleas, No. 3, of Philadelphia county.

Opinion by STERRETT, J. Filed January 16, 1882.

If the testimony tended to prove that the transaction between the parties was merely a cloak for usury, and not a *bona fide* contract for the storage and sale of the goods, to secure the loan in question, it must be conceded the jury should have been permitted to consider and pass upon the question of fact presented by the plaintiff's first and second points; but, we fail to discover, in the provisions of the contract itself, or in the facts and circumstances connected therewith, from its inception to its completion, anything from which the jury would have been justified in finding that it was, in substance and effect, a loan of money at a usurious rate of interest. The contract of August 18, 1876, is prefaced by an invoice of the merchandise "deposited with and confided to the management, custody and charge of the defendant company." This is followed by a recital that the company has advanced to the plaintiffs, "upon the security of said merchandise," its promissory note of the same date, for \$6,000, payable October 17, 1879, and has received "thirty dollars for its responsibility and services, as above, and loan of its credit." In consideration of the loan, the

plaintiffs agree to pay the company \$6,000 at or before the maturity of the note, "together with all charges for storage, insurance and other necessary expenses on account of said merchandise." Then follows a stipulation, on the part of the plaintiffs, to pay the company for its "continued responsibility and services in the management and custody of the said merchandise," in case further time is given upon their request, for the repayment of the amount advanced. It also contains several other provisions, intended to define the rights and protect the interests of the parties respectively in certain contingencies.

The note of the company, as recited in the contract, was given and then discounted for the plaintiffs at the rate of less than five per cent. per annum. There was certainly nothing usurious in that; and if the plaintiffs had kept their promise by paying the \$6,000 at or before the maturity of the note, they would have been entitled to forthwith resume possession of the merchandise pledged as collateral security. That would have ended the transaction, at a cost to them of fifty dollars for discount and thirty dollars for defendants' services and responsibility connected with the custody and management of the collateral. The discount, as has been observed, was considerably less than the legal rate, and the amount agreed upon and paid for services, responsibility, etc., was certainly not an unreasonable compensation therefor. As appears from the testimony of John Neill, one of defendants' witnesses, there was considerable trouble connected with the care and custody of the collateral. He says there were twenty cars of wheat; "these bills are called straight, not to order. It was necessary to notify railroad companies that we were holders of bills of lading. The collaterals were changed from one to another, and at one time changed to Lehigh Valley loan or stock. I suppose I was employed ten or fifteen minutes each day upon this transaction. These bills of lading were handed over to Hoffman & Co., after plaintiffs had failed, and the matter went out of my hands."

There is not a *scintilla* of evidence that the thirty dollars was paid for any other purpose than that expressed in the agreement, and in the absence of proof neither court nor jury had a right to presume it was intended for anything else. The transaction was strictly within the scope of the business authorized by the company's charter, viz., "to advance money and credits upon any property in its custody, or upon bills of lading, receipts or certificates representing goods on storage elsewhere, or in tran-

sit from one portion of the United States to another, or between the United States and any foreign country, or between any foreign country and the United States, on such terms as may be agreed upon between the borrowers and said company." This provision of the charter contains express authority for everything that was done in this case. The learned judge was clearly right in saying that no question of usury could arise out of the discount, or the payment of thirty dollars for services, responsibility, etc.

It was the plaintiffs' own default that called into active exercise the fourth clause of the contract under which the commissions complained of were claimed. It provides that in case the \$6,000 shall not be paid at or before the maturity of the note the company may thereupon at any time thereafter, in the discretion of its president, sell or cause to be sold, at plaintiffs' expense, the merchandise described in the invoice, at public or private sale, for cash or on credit, and without notice to them, and shall receive the proceeds thereof and apply the same to the payment in full of whatever may be then due by them to the company, including "the commissions of the company upon such sale, which shall be two and a-half per cent." This provision of the contract was faithfully carried out by the company after consulting the plaintiffs as to the best method of disposing of the merchandise. The president of the company employed Mr. Hoffman, an experienced commission merchant, to sell the grain, and the testimony shows that he acted judiciously. There is no complaint as to the time and manner of selling, and the jury has found that his commissions claimed and allowed as part of the expenses of converting the collateral into money, were just and reasonable. It is very clear, therefore, that Mr. Hoffman's commissions were a necessary and proper part of the expenses with which the plaintiffs were chargeable; it is equally clear that the company was entitled to retain, in addition thereto, two and a-half per cent. authorized by the contract. The testimony tends to show that this was a reasonable compensation for the trouble and responsibility incurred; but, however, that may be, it is what the plaintiffs agreed to pay in case a sale became necessary by reason of their default. The third point was rightly refused. The case was well tried, and there is nothing in the charge of the court of which the plaintiffs have any reason to complain.

Judgment affirmed.

For plaintiffs in error, *Messrs. Hood Gilpin and Charles Gilpin.*

Contra, Messrs. J. Bayard Henry and George Junkin.

KELLBERG, Administrator, etc., v. BULLOCK PRINTING PRESS COMPANY.

An affidavit of defense setting up a declaration by a decedent that a certain contract was construed by him in a certain way, the contract itself being ambiguous, held sufficient.

Error to the Court of Common Pleas, No. 1, of Philadelphia county.

Copy of instrument of writing on which suit is brought.

Memorandum of agreement between the Bullock Printing Press Company and John W. Kellberg, witnesseth:

That, whereas, John W. Kellberg has made various improvements on the Bullock Press, and invented certain movements and methods in printing machines, some of which have been patented in the United States and in Europe, and applications for others made or in preparation for the patent office here or abroad; and, whereas, it is the interest of the Bullock Company to own and control such inventions and improvements made and to be made. Now, for and in consideration of having paid all the expenses attendant on the procurement of the said patents, with the drawings, models and specifications, both in this country and elsewhere, as well as for the sum of one dollar and other considerations hereinafter mentioned, the said John W. Kellberg does hereby assign and agree to assign all his right, title and interest in all the aforesaid patented improvements made and to be made, whether patented now or hereafter, in the United States or elsewhere to the Bullock Printing Press Company, and to sign such papers as may be necessary from time to time for record to confirm and complete the title of the same in the said Bullock Printing Press Company. And the Bullock Printing Press Company as further consideration for said assignments and for future services and inventions, agree to do and perform as follows:

1. To credit said Kellberg with such sum as will satisfy the balance of amount against said Kellberg on the books of the company on the first day of January, 1874; and
2. To pay said Kellberg, in addition to his regular salary of twenty-six hundred dollars, the further sum of one hundred and fifty dollars every three months thereafter; that is to say, on the first day of the months of July, October, January and April.

Signed at Philadelphia this fourth day of April, 1874.

N. B.—This agreement is to date from the first day of July, 1873, and payments are to begin at that time.

WM. H. WILLIAMS,

Manager Bullock Printing Press Co.

JOHN W. KELLBERG.

Plaintiff avers that the patents above mentioned are still running, and that no payments have been made under above agreement since the death of John W. Kellberg, November 1, 1876, and claims to recover \$150. due January 1, 1877, and \$150 falling due every three months since, with interest on each of such quarterly installments.

J. COOKE LONGSTRETH,
with LEONARD MYERS,
Attorneys for Plaintiff.

Affidavit of defense filed as follows:

COUNTY OF PHILADELPHIA, SS.:

Stanley Williams being duly sworn, says, that there is a just and good defense to said action. That he is an officer of the said company defendant, and was such on January 1, 1873, and previously thereto, and has knowledge of the said agreement, a copy of which is filed.

That deponent was informed by the said John W. Kellberg that the agreement and contract by him with the company was that the compensation stipulated for in said agreement as "to pay said Kellberg, in addition to his regular salary of \$2,600, the further sum of \$150 every three months thereafter," was to cease with his regular salary at his death, and therefore that it was not to be a pension, annuity or royalty. That such was the intention, agreement and construction of said contract by both parties, and was so intended to be expressed in said agreement by them.

That all of the amounts due under said agreement have been paid to said plaintiff to the death.

Deponent further says that he is advised by counsel that independently of any parol evidence, the proper legal construction of said agreement is that said payments of \$150 quarterly stopped at said Kellberg's death.

All of which deponent believes can be proved on the trial.

For plaintiff in error, *Messrs. Longstreth & Myers*, cited *Ruggles v. Eddy*, 10 Blach., 52; *Day v. Skillman*, 1 Fish., 487; *Colt v. Selden*, 5 W., 525; *Sanford v. Decamp*, 8 W., 542; *Hamilton v. Neil*, 7 W., 517; *Wallace v. Baker*, 1 Binn., 610.

Contra, Pierce Archer, Esq., cited *Selden v. Williams*, 9 Watts, 9.

The court below refused judgment and plaintiff appealed.

PER CURIAM. Filed January 16, 1882.

Parol evidence of the understanding of the parties in relation to the construction of a written agreement may be given to explain that which otherwise is ambiguous: *Selden v. Williams*, 9 Watts, 9. No evidence could be better and more to the point than the declaration of Kellberg as sworn to in the affidavit of defense filed. Such evidence would of course carry the case to the jury. That the written contract was ambiguous we think it needs no argument to show.

Writ of error dismissed at the cost of the plaintiff and record remitted.

HORTON et al. v. HALL.

In a suit by a mill owner for damages resulting from the improper use of the stream by those above him, the producing power of the mill and the profits in operating the same when unobstructed by the acts complained of are pertinent facts in fixing the amount of damages. In such a case the measure of damages is the difference between the annual value or use of the mill, unaffected by the unlawful obstruction and as affected by it, and the jury have a right to consider in this connection any special contracts which the owner may have had or been able to obtain.

Error to the Court of Common Pleas of Warren county.

Opinion by MERCUR, J. Filed October 3, 1881.

The defendant in error was entitled to a reasonable use of the water of the stream for the

purpose of operating his mill and machinery, and of the pond, for the storage of logs, and for moving them and getting them to his mill, without any undue obstruction or check by the owners of the tanneries above. The latter were not liable in damages for such interruptions of the water as necessarily and unavoidably resulted from their reasonable use. The learned judge correctly stated the law as to the relative rights of the parties to the use of the water, and to this no error is assigned. The main objections are to the admission of evidence and to the measure of damages.

The producing power of the mill, and the profits in operating the same, when unobstructed by the acts of the plaintiff in error, are pertinent facts in fixing the amount of damages. The facilities and expense of getting logs to the mill and the cost thereof undoubtedly affect the profits arising from the manufacture of lumber. Evidence of the proximity and quantity of timber belonging to the owner of the mill was therefore relevant.

The claim was for damages sustained by obstructions in the pond in the years 1875 and 1876. The suit was brought in January, 1877. It would have been error to admit evidence of the condition of the pond after suit brought as a basis for damages, but no damages were claimed for that year. The evidence of its condition in 1877 was followed by showing that to be the same condition it was in the previous year, and the damages prior to 1877.

Damages for injury to property vary according to the nature and character of the property. The value of a mill depends on the profits which result from its being kept in operation. Whatever interrupts the use thereof so that it cannot be worked to advantage, causes loss and damage. The ability of the mill to be run with profit without the obstruction was a fact clearly admissible in evidence. The court correctly said "the measure of damages is the difference between the annual value or use of his mill unaffected by the deposit, and as affected by it." Nor did it err in declining to instruct the jury not to consider any special contracts which he may have had or been able to obtain. They were not such speculative or anticipated profits as to exclude them from the jury. Whether or not the business of manufacturing lumber was depressed during the years in question might seriously affect the profits and consequently lessen the damages of an interruption; yet it by no means barred the right of the defendant in error to recover for actual damages sustained as the immediate consequence of the wrongful act of the plaintiffs in error. The compensation

might be less, but, whatever it was, he was entitled to receive. We do not deem it necessary to consider all the assignments *seriatim*. Single sentences might be found in the charge subject to criticism, yet taken as a whole, it is not calculated to mislead, and contains a just statement of the law: *Pennsylvania Railroad Co. v. Dale*, 26 P. F. Smith, 47.

Judgment affirmed.

For plaintiff in error, *Messrs. Charles H. Noyes and Brown & Stone*.

Contra, Messrs. Wilbur & Schnur.

QUIGLEY & BAILEY v. DEHAAS.

Any material alteration or modification of a contract under seal necessarily constitutes the specialty part of a new verbal agreement that cannot be enforced by an action of covenant. But the waiver of one or more of the stipulations of a sealed agreement produces no such effect for the waiver, and neither destroys the original contract nor makes a new one, but only affects its execution.

Defendants, having fraudulently manipulated the umpire, are estopped from setting up that part of the contract to defeat the plaintiff.

Error to the Court of Common Pleas of Clinton county.

Opinion by GORDON, J. Filed October 3, 1881.

Any material parol alteration or modification of a contract under seal necessarily constitutes the specialty part of a new verbal agreement that cannot be enforced by an action of covenant: *Carrier & Baum v. Dilworth*, 9 P. F. Smith, 406. The reason of this is obvious; the specialty, as such, no longer exists; it has itself become but an element of the subsequent parol agreement, but an inducement for the more recent contract, and must, therefore, be enforced by an action of assumpsit. But it by no means follows that the waiver of one or more of the stipulations of a sealed agreement produces such an effect, for in such case the waiver neither destroys the original contract nor makes a new one, but only affects its execution. If A. should contract in writing, under seal, for a stipulated price, to build a house for B. and paint it, and B. should afterwards agree to release A. from the painting, we apprehend no one would say that there was in this such an alteration as would reduce the specialty to parol; for the remedy must be founded on the original agreement, seeing there is none other. There is here no substitution of new terms and conditions for the old. Both parties are held to all the covenants of the specialty, except that one which has been waived, and to nothing else; hence, the only possible remedy is covenant. If authority for a proposition so plain as this is wanting it will be found in the cases of *McCombs v. McKennan*, 2 W. &

S., 216, and *Ellmaker v. The Insurance Co.*, 6 Id., 439. Now, concerning the amendment made in the plaintiff's *narr.* which is complained of as introducing a new cause of action, we find it amounts only to the setting out of the waiver of that part of the contract which required the judgment of John M. Mason upon the work as a condition precedent to the plaintiff's right of payment. In other words, it sets out, what the jury have found to be the fact, that if the plaintiff would do certain items of work, which both Bailey, one of the defendants, and Mason, the arbiter, pointed out as necessary to complete the job, the contract should be regarded as fulfilled, and the plaintiff should have his pay. This, certainly, was not a substitution of a new agreement for the old; it was but a waiver of a single condition. So far as the substantial part of the contract was concerned, it altered it not in a single particular. It did not release Dehaas from a strict performance of what he had to do about the work which he had undertaken, neither did it impose upon Quigley & Bailey what they had not previously agreed to do. We repeat, therefore, that the amended *narr.* does not set out a new contract, hence no new cause of action. That the parties had the power to waive this part of their contract was intimated in our opinion when the case was here before, but without this, that the parties to a contract may waive any part or the whole of it, if they see fit so to do, is a proposition requiring no discussion.

On this branch the only remaining question is whether there was evidence sufficient to submit to the jury from which an acceptance of the work might properly be inferred. Dehaas swears that at or about the time when, as he considered, the job was finished or nearly so, Bailey and Mason made an inspection of the work, and pointed out certain things which they thought necessary to perfect the contract, such as the cutting out of some trees and the putting of some more earth on the top of a ditch. He then asked Bailey whether the job would be satisfactory to him when the work thus pointed out was done, and the answer was that it would be. He further says that under this agreement Bailey left, with the understanding that they were to have a settlement in a few days. Immediately afterwards he proceeded to finish what had been pointed out for him to do, but found that he was not able to bring Bailey to the promised settlement. He then spoke to Quigley, and told him he was afraid there was going to be trouble, but Quigley thought not, but said he no longer had any interest in the matter as he had sold out to Mason. Then, in

confirmation of this narration of Dehaas, we have the testimony of John Williams, who says Bailey told him the job was a good one. It is true this is denied by the defendants, but the jury, as they had a right to do, believed Dehaas. With this we have nothing to do; our question is whether this evidence, with the attendant circumstances, was sufficient, if believed, to support the hypothesis of the plaintiff. We think it was. For why did Bailey, in consideration of the performance by Dehaas of certain specific things, pointed out by himself and Mason, agree to accept and settle for the job if he intended to insist on the umpireship of Mason? He certainly thereby induced Dehaas to believe that he had waived this part of the contract, and if he did so deliberately, he ought to be held to it. His own testimony, if not confirmatory of that of the plaintiff, nevertheless exhibits so much of unfairness, so great a disposition to prevent an impartial judgment of the umpire, that we are not surprised that the jury gave it no credence. In answer to the question whether he had not pointed out to Dehaas the objectionable and unfinished parts of the work at the time he visited them in company with Mason, "I wanted," he goes on to say, "to satisfy Mr. Mason that the work was not in accordance with the contract, and went there for that purpose. I had told Mr. Mason before I went there it was not satisfactory." Then, in answer to the question, "Your purpose was to prevent its being taken off the hands of Dehaas?" The answer is, "Yes, sir." The frankness of all this is certainly admirable, but the honesty of the transaction is not so commendable. And what must we think of an umpire who would allow his judgment thus to be forestalled, who would submit to be made the mere tool of either of the parties? How, after this, could the plaintiff expect an impartial judgment from, or how could a court of justice require him to resort to, the decision of an umpire who had thus been manipulated. Had Dehaas been informed of the purpose for which Mason had been brought upon the ground he might have had some slight chance for defense, but care was taken that he should not have this information; for, as Bailey says, "I did not want to get into a controversy with Dehaas." The design seems to have been simply to post Mason on the defects of the job, and then leave Dehaas to the tender mercies of an umpire who had prejudged and condemned his work. That Bailey did accomplish his purpose as to the umpire is obvious, for he says, after he and Mason had ridden over the job, he, Mason, informed him that it was impossible for Dehaas to crib the creek according to the con-

tract. Under circumstances of this kind, about which there can be no doubt, since they are detailed by one of the defendants, it is idle to talk about requiring Dehaas to resort to the judgment of an umpire from whom, in consequence of the manipulations of the defendants, he could obtain nothing but an adverse decision. This conduct of Bailey forever estops him and his partner from setting up this part of the contract to defeat the plaintiff. When, therefore, the court submitted this part of the case to the jury on the question of waiver, it not only did that which the evidence justified it in doing, but also that which was the best for the defendants, and of which, therefore, they ought not to complain.

There was an exception taken to the ruling of the court in permitting the introduction of parol evidence to explain the understanding of the parties, at the time of the execution of the contract, as to how the dams should be built. But we think this was proper. By the contract these dams were to be built "in a good and substantial manner, as flood dams should be built in such streams, cribbed, sparred, puddle-ditched, calked and gravelled." To us it seems obvious that, in order to make this intelligible to a jury, some explanation was necessary, either from experts or from the understanding of the parties expressed at the time of the making of the contract; but of these two methods of arriving at the meaning of this agreement the latter was the better, as being the interpretation given to it by those most interested, hence the one which would be the most likely to express their intention.

We have discovered nothing else in the assignments requiring comment.

Judgment affirmed.

CONMEY v. MACFARLANE.

Where a want of consideration is relied on in defense of an action on a promissory note, and evidence is given on the one side in the affirmative, and on the other side in the negative, the burden of proof is on the plaintiff to satisfy the jury upon the whole evidence of the fact that sufficient consideration exists.

A. having been convicted of larceny, B. gave, before sentence, to C., the prosecutor, a note for a portion of the sum stolen from him by A. In a suit upon said note, brought by C. against B.:

Held, that if the note was given merely to secure part payment of the money which A. stole, the same was based upon no sufficient consideration, and that therefore the plaintiff was not entitled to recover.

Error to the Court of Common Pleas of Bradford county.

Assumpsit by Edward Overton against John Conmey upon a promissory note for \$450 made by the said Conmey.

The facts, as they appeared upon the trial before MORROW, P. J., were as follows:

Richard Conmey stole six hundred dollars from Edward Overton in December, 1877, for which crime he was arrested, and in February, 1878, was tried, convicted and sentenced. Between the time of Richard Conmey's conviction and that of his sentence, his father, John Conmey, the defendant, gave to the said Edward Overton two hundred dollars in money and the note in suit, the note and the money taken together having been intended by him to compensate Overton for the sum stolen from him by Richard Conmey, and also to pay the fees of Overton's attorney. The father thought that his son would by this means either be set free or that he would suffer a lighter punishment, although it did not appear on the trial that Overton had given up any right or claim against Richard Conmey, nor that John Conmey, the father, had received anything of value in consideration of the note made by him.

Overton died after having brought this action, and James Macfarlane, his administrator, was substituted for him upon the record.

The defendant asked the court to charge, *inter alia*: (2) That unless the jury find from the evidence that John Conmey has received a valuable consideration for the said note, the plaintiff cannot recover. *Answer*. "Under the evidence in the case this point is denied. But we say the note itself purports a consideration, and if you find it was given by the defendant to Mr. Overton to secure part payment of the money which Richard Conmey stole from him, without any threat or promise on Mr. Overton's part to have Richard's sentence made heavier or lighter, the transaction was lawful, and the note, if based upon it, was for a sufficient consideration, and the plaintiff may recover." (3) That under all the evidence in this case the verdict should be for the defendant. Refused.

The court charged the jury that, if Mr. Overton obtained the note through any threat or promise to influence the court in the sentence of Richard Conmey, the contract was illegal and void, and the plaintiff could not recover. But if they found that Overton had a claim against Richard Conmey for money stolen by him, and, in settlement of this claim, John Conmey voluntarily paid two hundred dollars in money and gave this note to secure the payment of the remainder, and there were no threats or promise on the part of Mr. Overton, as just mentioned, the plaintiff might recover.

After the jury had retired to deliberate, they came back into court and inquired if the pay-

ment of Mr. Overton's claim against Richard Conmey would extinguish it. They were instructed by the court that it would do so; that if the representative of Mr. Overton were to bring suit against Richard Conmey, proof of the payment of the debt or claim by John Conmey would be a complete defense.

Verdict for the plaintiff in the sum of \$500.75, and judgment thereon.

The defendant then took this writ, assigning for error the answers of the court below to the defendant's second and third points.

For plaintiff in error, *Messrs. L. M. Hall and D. C. De Witt*.

Contra, Messrs. John F. Sanderson, Edward Overton, Jr., and William Maxwell.

Opinion by TRUNKEY, J. Filed March 28, 1881.

A simple contract, oral or written, without consideration, is void and no action can be maintained upon it. The law requires that the consideration should be valuable to support an action to enforce an executory contract; but some loss or inconvenience to the promisee upon his entering into the contract, or some benefit to the promisor, is deemed a valuable consideration. Where a benefit is done to a third person at the request of the promisor, it is sufficient to support his promise. As where a person contemporaneously becomes surety for the debt, or for the performance of a duty of a third person, he renders himself liable thereupon. The consideration is the favor the surety receives from a compliance with his express or implied request that credit should be given to the principal. But unless the promise be contemporaneous with the original debt, and constitute the inducement thereto, it is not binding. A guaranty of a debt already contracted, or of a contract already made, without a new consideration, is void. Where there is a promise to pay the pre-existing debt of another person to his creditor, there must be a new consideration to support it, for the original consideration of the principal's contract cannot be so extended as to support the new promise. Bills of exchange and promissory notes differ from other simple contracts in this, that in an action on a bill or note a consideration is to be presumed until the contrary appear by evidence. The defendant may give proof of want of consideration, of failure of consideration, or that the consideration was illegal; and the only difference between a note or bill and any other contract, as between the immediate parties, is, that the burden of proof respecting consideration, in a certain sense, is shifted. These elementary

principles guide to a correct conclusion in the pending case.

The defense is want of consideration for the note sued upon, and the burden, in the first instance, is on the defendant to rebut the *prima facie* case the plaintiff made by producing the note. But having given such rebutting testimony, consideration being the only fact in issue, it devolved on the plaintiff to satisfy the jury that it existed. To maintain an action on a simple contract, the plaintiff must prove the consideration, and when the contract is a note, the note itself is *prima facie* evidence of a consideration. Where a want of consideration is relied on in defense of an action on a promissory note, and evidence is given on the one side in the affirmative, and on the other side in the negative, the burden of proof is on the plaintiff to satisfy the jury, upon the whole evidence, of that fact: *Delano v. Bartlett et al.*, 6 Cush., 364. In that case it was said that it was incumbent on the plaintiff to prove a consideration for the note, which she did by producing it, and making a *prima facie* case. It was competent for the defendants to rebut this evidence, and they offered testimony for that purpose. The evidence on both sides applied to the affirmative or negative of the same issue or proposition of fact, a consideration for the note; and the plaintiff's case requiring her to establish the fact, the burden of proof was all along on her to satisfy the jury, upon the whole evidence in the case, of the fact of a consideration for the note. Want of consideration was distinguished from failure of consideration, the latter, being a distinct proposition, the burden would be on the defendant to make it out against the *prima facie* case of the plaintiff.

It follows that the defendant's second point, to wit: "That unless the jury find from the evidence that John Conney has received a valuable consideration for said note, the plaintiff cannot recover," should have been affirmed.

Not only was said point denied, but the jury were instructed that the note itself purports a consideration, and if they found it was given by defendant to Overton to secure part payment of the money which Richard Conney stole from him, without any threat or promise by Overton to have Richard's sentence made heavier or lighter, the transaction was lawful, and the note, if based upon it, was for sufficient consideration, and the plaintiff may recover. This, we think, was grave error. The note does purport consideration, but not conclusively, and if there was evidence on both sides respecting that fact, the jury would weigh the evidence of the note with the other. It was unquestioned

that the note was given by defendant to Mr. Overton to secure part payment of the money which Richard Conney stole from him. And there is not a *scintilla* of evidence, outside the note, of any consideration for it. And if the jury found the fact just as stated in the answer to the second point, there was no consideration, and the plaintiff was not entitled to recover.

The defendant urges that the principle, that a note given by one person for a pre-existing debt owing by another is void unless there be a new consideration, has no application, because the note in this case was not given for a debt due or to become due, "but to ascertain, fix, determine and settle an unliquidated claim of damages in tort, and the consideration, so far as John Conney was concerned, was that very fixing, determination, liquidation and settlement." If given for damages arising from the tort of another person, the reason for requiring an immediate consideration for the note is quite as strong, if not stronger, than if given for a debt already contracted. John Conney was under no obligation to pay the stolen money; there was no claim against him to be adjudged and settled. He gave his nude promise to pay a certain sum. There is no pretense that the evidence shows a settlement of Overton's claim against Richard. He was not released. No time was given him. He could have been sued immediately, and Overton would have been entitled to full damages, deducting only the money actually paid by John Conney.

If one person has been guilty of a wrongful act which would render him liable in damages to another, and he promise to pay the injured person a sum of money as a compensation, this is a mere gratuitous promise, unless made in consideration of the injured person releasing his right of action for such damages: *Smart v. Chell*, 7 Dowl., 781. That action was against an attorney who had neglected his client's cause, which negligence resulted in the client's compulsion to pay £14 for costs. Motion was made in arrest of judgment, on the ground that the declaration failed to show a consideration for the alleged promise, and judgment was arrested. Among other things, the court remarked: "The declaration goes on to state another promise, that in consideration of the premises, the defendant promised to pay half the amount of those costs, and alleged a breach by non-payment of the £7. Now, no rule is more clear in law than that the consideration for a promise must move from the plaintiff; then I must see what this plaintiff has done or suffered, or what the defendant has gained; the detriment to the plaintiff must be the immediate consideration

for the promise alleged. Suppose an assault had been committed, and an action of assumpsit was brought for non-payment of a sum agreed to be given for the injury done, and the declaration did not state a release of action for the assault. It is not, therefore, enough that there be a collateral consideration for the promise, but there must be an immediate consideration."

Applying that doctrine to this case, it is clear that if the note was given merely to secure part payment of the money which Richard Conney stole, the plaintiff is not entitled to recover. If it was based on Richard's crime, and there was no immediate consideration therefor, it was *nudum pactum*, as would have been Richard's promise to pay Overton a sum of money for the injury done, without a release by Overton of his right of action for damages.

Judgment reversed and venire facias de novo awarded.

"MERCUR and STERRETT, JJ., dissent, as the facts proved do not justify the application of the law as stated."

Court of Common Pleas,

Luzerne County.

KULP v. CITY OF WILKES-BARRE.

Summary convictions for violations of municipal ordinances are not inconsistent with the right of trial by jury, as provided for in the constitution.

The mayor and council of the city of Wilkes-Barre may enact and adopt ordinances, and may provide therein that upon conviction of a violation thereof before the mayor offenders shall be punished by a fine or penalty. The power vested in the mayor must be strictly pursued. All the essentials of a summary conviction must be shown upon the record. These include, first, an information and a summons or notice to defendant; second, a conviction, judgment and execution according to the course of the common law; and third, a complete record of the whole proceeding, which may be reviewed by a higher court.

A personal note (as in this case) to the defendant is insufficient. The process should be entitled in the name of "The Commonwealth of Pennsylvania," and should consist either of a warrant or a summons.

Certiorari. Opinion by WOODWARD, J.

The record brought up by this *certiorari* from the mayor's court reads as follows:

"Now, August 29, 1881, before me, Thomas Brodrick, mayor of the city of Wilkes-Barre, appeared James Hall, who, upon his solemn oath, did depose and say, that the defendant did, on the 25th day of August, 1881, in company with others, within the limits of the said city of Wilkes-Barre, fight, quarrel, and was guilty of disorderly conduct, contrary to the provisions of Section 13 of the ordinance of the city aforesaid, entitled 'Good Order and Decency.'

"Same day, to wit, August 29, 1881, personal notice given to the defendant to appear before Thomas Brodrick aforesaid, on August 30, 1881, between the hours of 9 and 10 o'clock A. M., at the mayor's office, in said city, to answer the charge contained in the information aforesaid.

"Now, August 30, 1881, case called at 10 o'clock A. M., the defendant not being present. John C. White and Henry W. Rievers were sworn in behalf of the said city, and in support of said charge, when it appeared to me, Thomas Brodrick, the mayor aforesaid, that the said defendant is guilty of a violation of the ordinance, charged as aforesaid, to wit, Section 13 of the ordinance of the city of Wilkes-Barre, entitled 'Good Order and Decency,' in being present with others in the hotel of John C. White and in the public street in front of said hotel, within the limits of the said city of Wilkes-Barre, the 25th day of August, 1881, and then and there engage in disorderly conduct, by fighting and quarreling, and making loud and great noise, terror and tumult, against the peace, good order and decency of the said city. It is, therefore, adjudged by me, the said mayor, that the said defendant, according to the requirements of Section 13 of the ordinance aforesaid, entitled 'Good Order and Decency,' and in pursuance of the power and authority conferred on me by Section 11 of the charter of the city of Wilkes-Barre, be convicted, and he is accordingly convicted of the violation charged in the information aforesaid, and I do hereby adjudge that the said defendant, for the violation aforesaid, hath forfeited the sum of twenty dollars, and judgment for the said sum of twenty dollars, in the nature of a penalty, is entered publicly against the said defendant, and in favor of the said city of Wilkes-Barre."

The "personal notice" spoken of consisted of a note or letter from Mayor Brodrick to the defendant, bearing date August 29, 1881, requiring him to appear on the following day (August 30) "to answer the charge in the information aforesaid."

Two questions present themselves for our consideration: 1st. Is the ordinance under which these proceedings were instituted a constitutional and valid one? 2d. Was the mayor right in his method of administering the ordinance in the case now before us on this *certiorari*?

The Act of May 4, 1871, incorporating the city of Wilkes-Barre, provides, in Section 27, that the mayor and city council shall have power "to make such laws, ordinances, by-laws, rules and regulations, not inconsistent with the laws of this Commonwealth, as they shall deem necessary for the good government of said city."

In pursuance of the power thus vested in them, the mayor and city council have enacted certain ordinances, among which is the one entitled "Good Order and Decency." This ordinance is divided into twenty-one sections, and each section provides that *upon conviction* of what is therein prohibited the offender shall be liable to certain pecuniary penalties, not exceeding certain sums, which are specified.

The Act of May 4, 1871, Section 11, provides "that the mayor shall have the jurisdiction of and power, and it shall be his duty, to try and determine all actions, fines, penalties or forfeitures imposed by the laws of this Commonwealth relating to said city, or imposed by any of the ordinances, by-laws, rules and regulations thereof, and to issue execution to one of the constables of said city for any judgment in the premises, to be collected in the same manner as judgments of justices of the peace, founded on trespass or trover, are now by law collected."

Inasmuch as the charter vests in the mayor the right to try and determine all actions, fines and penalties imposed by any of the ordinances of the city, and the ordinances provide that *upon conviction* offenders shall pay certain penalties, it is clear that the city charter and the ordinances contemplate proceedings by means of what are known as summary convictions. As this method of procedure operates to the exclusion of trial by jury, and is in derogation of the common law, it should be applied with the utmost caution and in conformity with the strictest construction. Have, then, the mayor and city council, in adopting an ordinance which provides that *upon conviction* before the mayor offenders are to be punished by a penalty or fine, exceeded the powers constitutionally delegated to them by the Legislature of the State?

The Constitution of the United States and Acts of Congress in conformity thereto; the Constitution of the State in which a corporation is located, and Acts of the Legislature constitutionally made, together with the common law as there accepted, are of superior force to any by-law; and such by-law, when contrary to either of them, is therefore void, whether the charter authorizes the making of such by-law or not, because no Legislature can grant power larger than they themselves possess: Angell on Corp., c. 9; 4 Viner's Abr., 301; 7 N. Y., 585, 604; 5 N. Y., 538. See, also, *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St., 321.

In *Barter v. Commonwealth*, 3 Pa. St., 253, a case which arose upon a construction of the charter of the city of Lancaster, in which no power to commit to prison was given to the

mayor or aldermen, the Supreme Court held, that "a municipal corporation has no power to enact an ordinance inflicting a penalty, with imprisonment on default of payment, upon summary conviction. If the charter even purported to confer a power to imprison on summary conviction, and without appeal to a jury, it would be, so far, unconstitutional and void."

In *Butler's Appeal*, 23 P. F. Smith, 448, a case from this city, where an ordinance provided that after notice and failure to pay a tax on certain kinds of property, the party in default should pay a fine not exceeding one hundred dollars, or suffer an imprisonment not exceeding thirty days, or both, at the discretion of the mayor, the court held, that where there had been no effort to collect tax out of the property of the delinquent, the ordinance was unwarranted and void, and could not be enforced.

In *Phillips v. Allan*, 41 Pa. St., 481, it is said that "a municipal ordinance cannot prescribe a forfeiture of goods as a penalty for violation, unless by special legislative authority. They may impose fines or penalties, or pecuniary forfeitures, which are simply penalties. And, in general, the rule is, that a by-law, without an express act of parliament, can only be enforced by a pecuniary penalty, which must be certain." See, also, *Grant on Corp.* 84.

It is clear from these authorities, as well as from many others which might be quoted, that the doctrine of the law is, that where the process is summary, the authority must be statutory and beyond question.

Summary convictions, however, are provided for in many cases, and it is too late to claim that they are not to be sustained where the proper authority is found for them. Says Mr. Justice STRONG, in *Byers & Davis v. Commonwealth*, 6 Wr., 90: "But never in England was there any usage, and consequently never was there any right in the subject, that every litigated question of fact should be submitted to a jury. Summary convictions for petty offenses against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury. The ancient as well as the modern British Statutes at large are full of Acts of Parliament authorizing such convictions." He proceeds to cite various acts tending to show that the right of trial by a jury was never without limits.

In Pennsylvania the same thing is true. The statutes providing for the summary conviction of offenders are varied and numerous. We may instance those directed against delinquent overseers of the poor; against professional thieves in certain counties; against cruelty to animals;

against profanity and drunkenness; and against dog fighting, cock fighting, etc.

The 27th Section of the Act of May 4, 1871, delegates to the mayor and city council the power "to make such laws, ordinances, by-laws, rules and regulations, not inconsistent with the laws of the Commonwealth, as they shall deem necessary." In pursuance of the power so delegated, the mayor and council have enacted certain ordinances, for a violation of which they have imposed fines and penalties. Without the sanction of these penalties, the ordinances themselves would be valueless and without effect. And unless the mayor possesses the jurisdiction to hear and determine cases as they arise, the charter, which provides that "the mayor shall have power, and it shall be his duty, to try and determine all actions, fines, penalties or forfeitures * * * imposed by any of the ordinances, by-laws, rules and regulations," is mere waste paper, and the mayor himself a simple figure-head. We are of the opinion that the ordinance under which these proceedings were had was such an ordinance as the mayor and council might legally adopt, and that the mayor, under the eleventh Section of the City Charter, was possessed of the proper jurisdiction to try and determine any case arising under and from an alleged violation of the ordinance.

But it remains to inquire whether the mayor was right in his method of administering the ordinance in the case before us. It will be observed that while the ordinance provides that upon conviction offenders shall be subject to certain penalties; and while the charter makes it the duty of the mayor to "try and determine" all actions, penalties, etc., neither the charter nor the ordinances prescribe the form or method of procedure.

While we feel bound to adhere to that view of the law which regards summary convictions, in certain cases, as entirely consistent with the constitutional right of trial by jury, it is also true that, in all such cases, it must appear that the magistrate has strictly pursued to power vested in him. The essentials of a summary conviction, laid down by Burn (see Burn's Justice, 343), are these: 1st. An information or charge against the person, and a summons or notice to him, so that he may have an opportunity to make his defense. 2d. If the person is found guilty, there must be a conviction, judgment and execution, all according to the course of the common law, directed and influenced by the special authority given by the statute. 3d. There must be a record of the whole proceedings, wherein the justice must set forth the particular manner and circum-

stances, so if he be called to account for the same by a superior court, it may appear that he has conformed to the law, and not exceeded the bounds prescribed to his jurisdiction. See *Commonwealth v. Borden*, 11 P. F. Smith, 275.

In *Commonwealth v. Came*, 2 Parsons, 265, it was held by the Court of Common Pleas of Philadelphia that "when a statute simply imposes a penalty, but prescribes no form of prosecution, the conviction must be in accordance with the rules of the common law."

In *Van Swartow v. Commonwealth*, 12 H., 131, a case arising under the Act of 1851, forbidding the sale of liquor on Sunday, the Supreme Court say that "this is not a *qui tam* action, but a conviction, which it was proper to entitle in the name of the Commonwealth." See, also, *The Com'th v. Wolf*, 3 S. & R., 47.

The Constitution of Pennsylvania (Article V., Section 23) provides that the style of all process shall be "The Commonwealth of Pennsylvania."

The Act of June 13, 1836 (Purd., 42, pl. 1), enacts that personal actions, except in cases where other process shall be especially provided, shall be commenced by a writ of summons.

In the case before us it does not appear that the proceedings were commenced by the issue of any writ known to the law. There was neither warrant nor summons, but simply a personal note from the mayor to the defendant, a copy of which is as follows:

"You will take notice that information has been lodged before me, the subscriber, mayor of the city of Wilkes-Barre, that you, in company with others, on the 25th day of August, 1881, within the limits of the city of Wilkes-Barre, were guilty of fighting, quarreling and disorderly conduct, contrary to the provisions of Section 13 of the ordinance of said city, entitled 'Good Order and Decency.' You are, therefore, notified to appear before me, the mayor aforesaid, at my office, in the said city, between the hours of 9 and 10 o'clock A. M., on August 30, instant, to answer the charge in the information aforesaid.

"THOMAS BRODRICK,

"Mayor of the City of Wilkes-Barre.

"WILKES-BARRE, August 29, 1881."

The essential errors in the proceedings by the mayor were:

1. The omission to issue either a warrant or a summons against the defendant, entitled in the name of the Commonwealth of Pennsylvania.
2. The omission to make a complete record of the whole proceedings, including the testimony in detail, rather than the impressions or conclusions resulting from the testimony.

For these reasons the exceptions are sustained and the proceedings reversed.

For plaintiff in error, *S. J. Strauss, Esq.*

Contra, *W. S. McLean, Esq.*

—*The Luzerne Legal Register.*

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PITTSBURGH, PA., JULY 5, 1882.

In Memoriam.

HON. WILSON McCANDLESS, LL. D.

At an early hour on Saturday last the Hon. WILSON McCANDLESS, LL. D., ex-Judge of the U. S. District Court, died at his home in the Eighteenth ward. Judge McCANDLESS was born at Noblestown, this county, on June 19, 1810. His parents, who were of Scotch-Irish extraction, were natives of this country. His collegiate education was obtained at the Western University. During his schooling there his father, William McCandless, was the Prothonotary of the county. After leaving school he entered the law office of the late Hon. George Seldon, and was admitted to the Bar in 1834. Shortly after his admission he formed a partnership with the late Hon. W. W. Fetterman, and later practiced in connection with his brother-in-law, Hon. W. B. McClure, and the firm shortly became one of the leading ones of the city, and was found engaged in all the prominent cases tried in the courts during its continuance. After pursuing his profession for twenty-five years, he was appointed Judge of the U. S. District Court for the Western District of Pennsylvania, on February 8, 1859, to fill the vacancy caused by the transfer of Justice Grier to the Circuit Court. Upon this Bench he continued until July, 1876, when, at his own request, he was retired.

During his term of practice at the Allegheny County Bar he was engaged in the most important cases tried. The record he has made as a Judge is an honorable one. He has been ever noted for his promptness, his urbanity, his sound judgment and his righteous decisions—considering both the law and the equity of his cases. Among the prominent attorneys who were admitted about the same time to the Allegheny Bar, with Judge McCANDLESS, may be mentioned Geo. W. Acheson, Hon. Daniel Agnew, A. W. Foster, Jr., Hon. W. W. Irwin, A. W. Loomis, John D. Mahon, Hon. Thomas Mellon, James H. Stewart and Hon. James Veech.

At an earlier period of his life, the Judge was widely known as a politician of the Democratic faith, having been three times a Senatorial Elector for President and Vice-President of the United States in 1844, 1852 and 1856. He was twice President of the Electoral College of Pennsylvania, and Chairman of the Pennsylvania delegation in the Baltimore Convention of 1848, which nominated Cass and Butler. Imperturbed by the party to which he belonged, he was twice a candidate for Congress in this (then) strong Whig district, namely, in 1846, when he was defeated by the Hon. Moses Hampton, and 1856 again defeated by the Hon. David Ritchie.

For many years he was Inspector, and part of the time President of the Board of Inspectors of the Western Penitentiary; for years Director of the M. and M. Bank of this city; at the same time he was Trustee of the Pittsburgh Gas Works; and of his *Alma Mater*, the Western University. He was one of the originators of the Allegheny Cemetery; was the first President of the Homeopathic Hospital, and also one of the oldest members of the Vestry of Trinity Church, and a prominent member of the Masonic order.

His powers of oratory are traditional with the members of the Bar. He was frequently called upon to receive public men of distinction who have visited this city. Among others, John Quincy Adams, in 1843. From the exordium of that speech we quote as follows:

"We have not strewed flowers in your path, nor erected triumphal arches at your approach, but greet you with the homage of grateful hearts as evinced in this spontaneous outpouring of the people. Like the son of Marcus Cato you have been a foe to tyrants and your country's friend, and that country now tenders to you this token of her affection and gratitude.

"You seem, sir, like the aged oak standing alone upon the plain, which time has spared a little longer after all its contemporaries have been leveled with the dust, but the people delight to gather around the venerable trunk, and dwell beneath the shadow of its yet green foliage."

And in conclusion he said:

"Great and good citizen! Venerable and venerated man! Panegyric or eulogy here, or hereafter, cannot add one cubit to your stature. Live on! live in honor and usefulness, and when 'this corruptible shall have put on incorruption, and this mortal immortality,' I pray God that it may be in the calm serenity of that summer's evening when bonfires and illuminations light up the land, in commemoration of that glorious independence to the achievement of which your illustrious Father so largely, so eminently contributed."

Upon the death of General Jackson, in 1874, at the request of the citizens of Pittsburgh, he delivered the eulogy in honor of that distinguished ex-President. On the occasion of the re-interment of the remains of Commodore Barney and Lieutenant Parker of the United States

Navy, Judge McCANDLESS delivered an oration, the eloquence of which was probably the finest of his life; and of all the brilliant passages in this great speech, the first sentence in his exordium, homely as it is, has outlived them all: "These bones live! Live in the affections of the American people," and some of the aphorisms to which he then gave birth are still current among his admirers of the Bar.

Whilst on the Bench, the Judge was remarkable for the high appreciation of the dignity of his office, his conduct commanding the unqualified respect and admiration of those who were associated with him in the business of the law, giving a strict and unquestionable impartiality of judgment in the consideration of the innumerable cases that were submitted to his jurisdiction.

Judge McCANDLESS was married December, 1834, to Miss Sarah Collins, daughter of Thomas Collins, a well-known citizen of Pittsburgh, who still survives him. He leaves behind him a son, S. C. McCandless, Esq., Clerk of the United States Court, and one daughter.

A meeting of the Bar was held on Saturday last in the U. S. Court room to take action appropriate to the occasion. The Hon. M. W. Acheson presided, and the other officers were: Vice-Presidents—Hon. Edwin H. Stowe, Hon. F. H. Collier, Hon. John H. Bailey, Hon. Thos. Ewing, Hon. J. W. F. White, Hon. John M. Kirkpatrick, Hon. William G. Hawkins, Hon. J. W. Over, C. S. Fetterman, Robert Robb, Alex. H. Miller, John Barton, James I. Kuhn, Hon. P. C. Shannon, George Shiras, Jr., John H. Hampton.

Secretaries—John M. Kennedy, George Guthrie, James H. Hopkins, Charles B. Kenny, Alex. M. Watson, S. H. Geyer, F. M. Magee, S. A. McClung.

Committee on Resolutions—Thomas M. Marshall, D. T. Watson, Hill Burgwin, M. Swartzwelder, Malcolm Hay, John R. Large, William Bakewell, W. B. Rodgers, J. F. Slagle, John Dalzell. The following minute presented by the committee was unanimously adopted:

An occasion of unusual and solemn interest has caused us to assemble to-day. A distinguished lawyer, an upright Judge and a valued citizen has passed from our midst, and it is due to his memory that there should be left an enduring expression of the estimation in which he has been held by the brethren of the Bar and of the Bench. Hon. WILSON McCANDLESS was born at Nobles-town, Allegheny county, Pennsylvania, on the 19th of July, 1810. Sprung from a sturdy and resolute Scotch-Irish stock, he early gave evidence of the intellect which in after years made him prominent as one of the leading men of Pennsylvania. He was educated at the Western University in this city, and having graduated with distinguished honors, commenced the study of the law. Possessed of a vigorous constitution, of buoyant spirits

and unflagging industry, he started in his professional career with bright prospects before him. He was admitted to the Bar of Allegheny county on the 17th of June, 1831, and such were his abilities that W. W. Fetterman, at that time one of the leading lawyers of Western Pennsylvania, took him into partnership, which continued until Mr. Fetterman's death. As a jury lawyer Mr. McCANDLESS soon acquired great reputation and rose rapidly to rank at the Bar as one of the most eloquent advocates. For a number of years he and the late Judge McClure practiced law together and enjoyed a practice so extensive that they were engaged on the one side or the other of almost every case of any importance tried in the courts of Allegheny county. After the elevation of Judge McClure to the Bench of the Common Pleas Court of Allegheny county, Judge McCANDLESS remained at the Bar and enjoyed a lucrative practice until the 8th of February, 1859, when he was appointed by President Buchanan District Judge of the United States Court for the Western District of Pennsylvania. For 28 years he had devoted his whole time and attention to his profession, and had gained the reputation of being one of the most eloquent and able advocates that the Bar of Pennsylvania contained. His career upon the Bench was marked by an earnest desire to administer the law with impartiality and strict fidelity. His manner was dignified, his temper calm, and his whole demeanor such as to impress any one that the dignity of the office was in worthy hands. In the trials of criminals, a great number of whom were brought before him, he held the Government to great strictness of proof in order to work a conviction, and was merciful when he was compelled by a sense of duty to impose the penalty that the law had fixed for the transgression of the wrong-doer. This characteristic upon the Bench was prominent in him, perhaps more than in any Judge whose imperative duty has been to pass judgment upon persons convicted of crime. In this generous and noble nature it could not be otherwise than that the trembling criminal, while standing at the Bar of justice, should cause his heart to throb with pity and commiseration. If ever he did err in imposing sentence, it was upon mercy's side.

As a citizen he gave his aid and counsel in all projects intended for the public welfare. He took a great interest in all measures that were devised for the education of the young, and gave his encouragement and support whenever asked to promote the welfare of institutions of learning. He was kind and charitable in his nature, and was prominent in good works and for the founding of institutions intended for the relief of the sick and suffering. In fact, we all remember him a most humane and kind-hearted man, always ready to do his part in advocating the general interest of the people among whom he lived and of the city of whom he was so justly proud. To the principles of the Democratic party he early gave his unflinching and unswerving allegiance, and prided himself upon belonging to what he termed the Jeffersonian school of politics. For years he was the advocate of his party in this county and in Pennsylvania, and of the principles which it asserted, and was known throughout the Commonwealth as one of the most distinguished Democrats it contained. He was honored on several occasions by being elected a delegate to conventions for the nomination of Presidents and Vice-Presidents, and occupied a distinguished position in his party during all the active period of his life. In social life he was pleasing and attractive and his society was a source of pleasure to all who came in contact with him. Manly in form, dignified in presence, yet he was full of wit and humor, quick at repartee, and greatly enjoyed the society and companionship of men like himself, who found

much in life to amuse and entertain. Mirthfulness was a marked feature of his mental composition, and few men passed through life possessing so even and well-balanced a temper. Pleasing in address and affable in manner, he won his way to the hearts of all who met him. No one can recur to-day to his life without being impressed with the fact that rarely ever did he exhibit a loss of temper. After a long and eventful life his career is closed—a career of usefulness to his profession, an honor to the Bench and a benefit to the community in which he lived. He descends to the tomb full of years and full of honors, lamented by a devoted and loving family, and by a large number of friends who knew and loved him.

Speeches were made by Judge Ewing, Hon. James H. Hopkins, Col. R. Biddle Roberts, of Chicago, R. B. Carnahan, Esq., and Maj. A. M. Brown.

A very excellent engraving from a photograph of Judge McCANDLESS was printed in the PITTSBURGH LEGAL JOURNAL of June 14, 1876.

Supreme Court, Penn'a.

HUGHES et al. v. ST. CLAIR COAL CO.

ST. CLAIR COAL CO. v. HUGHES et al.

A. conveyed to B. a tract of land excepting and reserving certain lots. B. conveyed the same to C. in trust to re-convey to A. A. then conveyed his interest in said land to D. without exception or reservation, whereupon C. conveyed all the estate derived from B. to D. Held, that D. was to be deemed to stand seized of the whole tract without any exception or reservation.

The owner of a tract of land conveyed the same by deed, excepting and reserving certain lots which were recited to have been sold or contracted to be sold by him to other parties. This was the case with most of the lots but not with one lot A. It did not appear what possession vendor or vendee afterwards had of lot A. Held, that the vendor must be deemed to have excepted lot A. from his conveyance, and that no title to the same passed thereby.

Miller v. Holman, 1 Grant, 246, distinguished.

Writs of error to the Court of Common Pleas of Schuylkill county.

Ejectment by John Hughes and others against the St. Clair Coal Company for a certain tract of land numbered 344 in the borough of St. Clair.

The facts of the case as they appeared on the trial, before WALKER, A. J., were as follows:

In 1830 Francis B. Nichols was seized in fee of a certain tract of land known as the St. Clair tract, on part of which a town plot was laid out, wherein were various lots, among others one numbered 344.

By deed dated February 2, 1833, Nichols and wife conveyed to George Ryan an undivided fourth part of the said tract described by metes and bounds, and as containing 402 $\frac{3}{4}$ acres—

"Excepting and reserving, nevertheless, out of this grant or conveyance the forty lots of ground numbered respectively in the plan or draft of the town of St. Clair, 12, 15, 16, 17, 18, 19, 20, 21, 22, 56, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 36, 37, 40, 41, 42, 47, 110, 111, 112, 113, 114, 93, 95, 101, 102, 103, 104, 105, 337 and 334, which said lots have heretofore been sold or contracted to be sold by the said Francis B. Nichols to sundry persons, and are parts and parcels of the said land above described."

The greater part of said lots had been sold or contracted to be sold, but this was not the case with lot No. 344.

On May 30, 1834, Ryan and wife, by a deed poll conveyed to the Schuylkill Bank of Philadelphia this undivided fourth part of the St. Clair tract, reciting it to be the same premises conveyed to George Ryan, by deed above mentioned—

"In trust, nevertheless, that if Francis B. Nichols shall pay to the said, the Schuylkill Bank, the sum of five thousand and nine dollars ninety-eight cents, with legal interest on the same, the said sum being the amount of a judgment against the said Ryan, held by the said bank, that then the Schuylkill Bank shall grant, bargain, sell and deliver to the said Francis B. Nichols, his heirs and assigns, the said undivided fourth part of the said tract of land hereby conveyed."

On July 3, 1835, Nichols and wife by deed, reciting that they had "granted and conveyed unto George Ryan in fee one full equal and undivided fourth part (the whole into four equal parts to be divided) of and in the tract of land hereinafter particularly described with the appurtenances" conveyed unto Henry C. Carey and Isaac Lea, an undivided fourth part of the St. Clair tract, describing the same by metes and bounds, and as containing 402 $\frac{3}{4}$ acres and "all the estate, right, title, interest, property, claim and demand of them," the said grantors "of, in and to the same." Said deed contained no exception or reservation whatever, and in the *habendum* clause described the property conveyed as "the equal and undivided fourth part (the whole into four equal parts to be divided) of and in the said described tract of land."

On September 6, 1838, the Schuylkill Bank, reciting all the foregoing deeds, and the payment of the judgment held by it against Ryan, conveyed to Carey and Lea the one-fourth of the St. Clair tract conveyed to it by Ryan.

By deed dated June 18, 1835, Nichols and wife conveyed to Edward L. Carey and Abraham Hart three full equal and undivided fourth parts of the St. Clair tract, describing it by metes and bounds, and as containing 402 $\frac{3}{4}$ acres—

"Excepting and reserving, nevertheless, thereout the forty-one lots of ground, numbered respectively in the plan or draft of the town of St. Clair, 12, 15, 16, 17, 18, 19, 20, 21, 22, 56, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33,

36, 37, 40, 41, 42, 47, 110, 111, 112, 113, 114, 115, 93, 95, 101, 102, 103, 104, 105, 337, 344, heretofore sold or contracted to be sold by the said Francis B. Nichols to sundry persons in fee and are parts and parcels of the tract of land aforesaid."

Said lot No. 344 had not been sold nor had it been contracted to be sold by Nichols.

Nichols afterwards died, and a judgment was recovered against his administrator, under which all Nichols' interest in the St. Clair tract was sold at sheriff's sale. Plaintiffs claimed under this title.

All the interest of Henry C. Carey, Isaac Lea, Edward L. Carey and Abraham Hart became afterwards vested in Carey, Hart and Baird, who were the lessors of the company defendant.

The court charged, *inter alia*, as follows: "The deed from Francis B. Nichols and wife to Carey and Lea, of July 3, 1835, for the undivided one-fourth ($\frac{1}{4}$) of the St. Clair tract requires to be construed by the court. Both the plaintiffs and defendants have placed their own construction upon the words in the exception contained in the grant.

"The plaintiffs claim that as Mr. Nichols sold the *same undivided one-fourth* part of this land which he formally conveyed to George Ryan, reserving these forty-one lots, that therefore in his deed of July 3, 1835, he conveyed to Carey and Lea the same undivided one-fourth part of the said tract subject to the exceptions therein contained by implication.

["The rule of law in the construction of deeds is, that the language must be taken most strongly against the grantor, and therefore, we think, that under a fair construction of the terms of the deed, the legal title to the whole of the undivided one-fourth of the lot in dispute passed to Carey and Lea by virtue of that conveyance.] [And we also think that by virtue of the reservation of the forty-one lots contained in the deed of June 18, 1855, from Francis B. Nichols and wife for the undivided three-fourths of this tract, no title passed to Carey and Hart to the lot in dispute, but that such title remained in Francis B. Nichols, the grantor, at the time of the delivery of that deed, and is now vested in his legal representatives, the plaintiffs in this suit.

"Entertaining these views we instruct you to find in favor of the plaintiffs for the undivided three-fourths of the lot, being lot number 344, in the borough of St. Clair, Schuylkill county, in controversy, and more particularly described in the *precipe*, with six cents damages and costs."]

Verdict and judgment for the plaintiffs accordingly, for the undivided three-fourths of

the lot in dispute, whereupon plaintiffs took a writ of error, assigning for error, *inter alia*, the first clause of the charge included in brackets.

Defendant also took a writ of error, assigning for error the last two clauses of the charge included within brackets.

For Hughes *et al.*, Messrs. Hughes & Farquhar.

For the St. Clair Coal Co., Messrs. J. F. Whalen, James Ellis and E. C. Mitchell.

HUGHES V. THE ST. CLAIR COAL CO.'

Opinion by GREEN, J. Filed May 2, 1881.

It is quite true that in the deed from F. B. Nichols and wife to Carey and Lea, dated July 3, 1835, the property conveyed was described as "the *said* one full equal and undivided fourth part," etc., of the St. Clair tract, and that for the particulars of the description it might have been necessary, if there were nothing else in the deed to answer the purpose, to refer to the first recital. But there is no occasion to resort to the recital, because the words of the deed immediately following those above quoted contain a precise description of the entire St. Clair tract by courses and distances, and as containing the full quantity of 402 $\frac{1}{2}$ acres. The property actually conveyed by the words of conveyance in the deed is the one undivided fourth part of the whole tract of 402 $\frac{1}{2}$ acres, and there are no words there or elsewhere in the deed which in the least degree limit, restrain, except or reserve any part of the tract out of the operation of the instrument. On the contrary, the *habendum* clause again describes the subject-matter of the conveyance as "the equal and undivided fourth part (the whole into four equal parts to be divided) of and in the said *described tract of land*," etc. Even if we recur to the recital, the case is not helped; for it states that the deed of Nichols and wife to George Ryan, dated February 2, 1833, "did grant and convey unto George Ryan in fee one full equal and undivided fourth part (the whole into four equal parts to be divided) of and in the tract of land *hereinafter particularly described*, with the appurtenances." No reservation or exception out of the grant is in any manner made, or referred to as having been made, and as this is a deed, not from Ryan, for the title which he held, but from Nichols and wife, the original grantors, who still held the lot No. 344, there is nothing to restrain the operative words of the grant. They necessarily include all the territory of the entire tract, and we cannot limit them to anything less without arbitrarily changing the express contract of the parties, which we have no right to do.

Judgment affirmed.

THE ST. CLAIR COAL CO. V. HUGHES ET AL.

Opinion by GREEN, J. Filed May 2, 1881.

We are clearly of opinion that the learned judge of the court below was correct in the interpretation which he gave to the deed of 18th June, 1835, from Francis B. Nichols and wife to Carey and Hart. This deed, in terms, conveyed the three undivided fourth parts of the St. Clair tract, describing it by metes and bounds, and as containing 402 $\frac{1}{2}$ acres, but "excepting and reserving, nevertheless, thereout the forty-one lots of ground numbered respectively in the plan or draft of the town of St. Clair, 12, 15, 16, 17, 18, 19, 20, 21, 22, 56, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 36, 37, 40, 41, 42, 47, 110, 111, 112, 113, 114, 115, 93, 95, 101, 102, 103, 104, 105, 337, 334, heretofore sold or contracted to be sold by the said Francis B. Nichols to sundry persons in fee, and are parts and parcels of the tract of land aforesaid." This is certainly an express exclusion of the several numbered lots, including No. 344, being the one in dispute, from the operation of the deed. That is, it is a precise and definite statement that the grantors do not mean to pass the title to these lots. It is true that the lots are also referred to as having been sold or contracted to be sold to other persons, and it is argued that as to any lots which in point of fact had not then been sold, or contracted to be sold, the title did pass to Carey and Hart by the operative words of the deed. But we cannot perceive the force of this argument. The language in question is merely descriptive, and is only partly descriptive of the lots excepted out of the deed. The preceding words containing the numbers of the lots, are a full and precise designation of the land which is *not* conveyed, and the additional words are but a generality of expression, indicating that the same lots had been the subject-matter of contracts of sale. There is no question that this language, in its generality, was strictly true, and it would be a very strained inference to argue that because it was not strictly true of each and every one of the lots, therefore *those* lots were *intended* to be, and hence were actually conveyed, in the face of the express declaration that they were not to be conveyed. The argument from intent, therefore, is not sound. Nor is there any merit in the suggestion that there are no proper words of exception to save the title of the grantors. In the case of *Whitaker v. Brown*, 10 Wright, 197, in which the distinction between an exception and a reservation was carefully stated, it was held that even words of reservation only, if the subject-matter was a thing corporate and *in esse*, would operate by

way of exception. It was therefore held in that case, that in a fee-simple deed for a tract of land where the grantor reserved for his own use the coal contained in the tract, it operated as an exception of all the coal in perpetuity in favor of the grantor and his heirs. But in the present case the words used are both "excepting" and "reserving," and the *corpus* of the land itself is the subject of the exception. In such circumstances it would be a plain departure from all the authorities to hold that the title of the grantor was not preserved by the exception contained in this deed. As to the allegation of possession, we see no evidence in the case sufficient to countervail the effect of the reservation in the deed. No point was made that a title by adverse possession had been acquired, and if it had, the court would have been obliged to refuse it.

There is nothing in the case of *Miller v. Holman*, 1 Grant, 246, conflicting with these views. There the deed from Bones and wife contained an express recital that the excepted lots had been previously conveyed; that the title to them was vested in other persons, and that Bones and wife held no estate in them. In the deed from Nichols and wife in the present case, no such language is found. But in *Miller v. Holman*, even the recitals mentioned were held to be insufficient evidence of an outstanding title, and the case was reversed because the court below had directed a verdict for the defendant. On the second trial it was affirmatively proved that Bones had sold all the lots in controversy to persons whose names were given; that conveyances were made out for all of them, and that some were delivered; that the purchasers did not take possession of their lots, but they remained inclosed with the other land of Bones, and were used by him as part of his farm until 1841; that Bones then sold the whole tract to Olwine, with the clause of exception as above stated in the deed, and delivered possession to him as fully as he held it himself, which possession continued to the time of suit brought by the heirs of Bones for the excepted lots. Of course, in these circumstances, as Bones had parted with his title, and also with his possession, which was actual and adverse in his grantee, his heirs could not recover. This court (LOWRIE, J.), said on p. 246: "The sale of the lots is not disputed, and there is evidence that they were conveyed. But the vendor kept possession for seventeen years, and then sold and delivered the tract subject to the exception referred to. How could Bones after that get back the possession of the lots without showing that he had got back their titles?"

This he has not done." The case would have been parallel with the case at bar, if it had been proved that Nichols and wife had sold and conveyed the lot No. 344, and had delivered the actual possession of it as part of the whole St. Clair tract to Carey and Hart as farm land, or land actually in use, and that possession had been continued in the same manner to the time of suit brought; but in all these particulars the cases are different, and therefore not analogous. These views render it unnecessary to consider the assignments of error in detail.

Judgment affirmed.

COMMONWEALTH, to use, etc., v. HOWARD.

Courts have, by virtue of their equity powers, the right to grant relief in proper cases by opening judgments entered for want of a plea, even after the expiration of the term in which the judgment has been entered.

The exercise of this authority rests in the sound discretion of the court, and its action is therefore not ordinarily reviewable on error.

Where the sureties upon a bail bond failed to surrender their principal in accordance with the terms thereof, and judgment was accordingly entered thereon against them, and subsequently, in pursuance of information given on behalf of the bail, the plaintiff arrested the principal and lodged him in jail, where he remained until duly discharged under the insolvent laws.

Held, that the court was right, on the application of the bail, in opening the judgment against them, and entering an *exoneratur* as to them.

Whether a writ of error will lie to the exercise of the discretionary power of the court to grant such relief, not decided.

Error to the Court of Common Pleas, No. 1, of Philadelphia county.

Debt upon a bail bond by the Commonwealth to the use of James Clinton against Joseph A. Young, John G. Howard and George Gray.

In 1879 Clinton brought suit against Young for malicious prosecution, issuing a *capias ad respondendum*. The defendant was arrested, his bail fixed at five hundred dollars, and the bail bond in suit taken, whereon Howard and Gray were sureties. Defendant was then released, and subsequently, on the trial of the cause, failed to appear. On April 17, 1879, Clinton recovered a verdict, and on April 21st judgment was entered thereon. Subsequently a *ca. sa.* and *fi. fa.* were issued upon this judgment, which were returned respectively, "*n. e. i.*" and *nulla bona*. The sureties upon Young's bail bond having failed to surrender their principal, the bail became fixed on June 16, 1879.

Meantime, on May 12, 1879, Clinton instituted the present suit, whereon defendants, Howard and Gray, were served. A *narr.* and rule to plead were filed, and on July 7, 1879, judgment was entered against defendant How-

ard for want of a plea. Afterwards, in September, 1879, plaintiff being informed by defendant Howard's wife that Young could be found, caused an *alias ca. sa.* to be issued, upon which Young was arrested and lodged in jail. He remained there until discharged by his own application under the insolvent laws.

Defendant Howard thereupon, in May, 1880, obtained a rule to open the judgment as to him in the present case, and also to show cause why an *exoneratur* should not be entered on his bond. Both these rules were afterwards made absolute by the Court, BIDDLE, J., delivering the following opinion:

"There is no doubt that the bail here did not surrender their principal in time to prevent judgment being taken against them. It appears, however, that after judgment had been taken, information was given by the wife of one of the bail to the plaintiff, which enabled him to get the body of the defendant and put him in prison. After having done this, we think he is estopped from pursuing the bail for his non-production. He might, after the fourteen days, have refused to accept the surrender of the bail, but if he chose to do so, we think he waived his right to proceed subsequently against the bail for his failure to produce him within that time. In point of fact the person was surrendered by the bail, and when the plaintiff accepted the surrender the bond was satisfied. The only possible injury which the plaintiff has sustained by the failure to surrender in fourteen days, arises from the costs of the suit upon the bond. Upon payment of these costs we make both the rules absolute."

The plaintiff thereupon took this writ, filing the following assignments of error:

The learned judge erred—

1. In assuming that the person was surrendered by the bail, because no evidence whatever was before the court proving such fact.

2. In deciding that the plaintiff waived his right to proceed *subsequently* against the bail, because the record shows that the plaintiff did not proceed in any way *subsequently* to the taking of the defendant, Young's body, against the bail.

3. In making absolute this rule for an *exoneratur*, because after the *quarto die post* the bail was fixed and liable to the plaintiff for the debt, interest and costs which were due the plaintiff from the defendant, Young.

4. In making absolute the rule to open judgment against the bail, because said judgment had been properly procured in an adverse proceeding, and upon proper notice.

5. In opening the judgment, because more

than two terms of court had intervened after the entry of the judgment, and before said rules were taken by the defendant in error.

For plaintiff in error, *Messrs. T. Cuyler Patterson and H. H. S. Handy.*

Contra, Isaac D. Yocum, Esq.

Opinion by STERRETT, J. Filed February 28, 1881.

The judgment which was opened by the court below was not obtained adversely within the meaning of the rule contended for by the learned counsel for plaintiff. While it may be conceded that, as a general rule of practice, the court in which a judgment has been adversely obtained by trial or hearing on the merits has no power to open the same after the expiration of the term in which it is rendered, it is otherwise as to judgments by default for want of an appearance, plea, etc. The court, by virtue of its equity power in such cases, may grant relief by opening such judgments, even after the term at which the default occurred. In considering the effect of a judgment by default for want of appearance, it is said by the present Chief Justice that "such a judgment ought to have no greater force than a judgment by confession or on warrant of attorney by *nil dicit* or *non sum informatus*, on which it has never been pretended that the court does not possess full power after the term. It might be productive of the most monstrous injustice to hold otherwise." *Reigel v. Wilson*, 10 P. F. Smith, 388. What is there said in relation to judgments in default of appearance is to a certain extent applicable to all judgments by default. Indeed, the power of the court to open such judgments and let defendants into a defense, either during the term in which default occurs or afterwards, cannot be doubted. The exercise of this authority rests in the sound discretion of the court, and its action, being thus discretionary, is not ordinarily reviewable on writ of error: *Reigel v. Wilson, supra*; *Hill v. Irwin*, 3 Casey, 314. The two last assignments are not sustained.

The authority of the court to order an *exoneratur* on defendant's bond is involved in the three first specifications of error. In *McClurg v. Bowers*, 9 S. & R., 24, it was doubted whether such an order was the subject of a writ of error. No reason is there given, but it may be found in the phraseology of the Statute 4 Anne, chap. 16, Sec. 20, regulating proceedings on bail bonds, etc. That act, which has been held to be in force in this State, provides that "the court where the action is brought may by rule or rules of the same court give such relief to the plaintiff or defendant in the original action,

and bail on the bail bond, as is agreeable to justice and reason; and the rule or rules of the said court shall have the nature and effect of a defeasance to the said bond." The discretionary power thus vested in the Courts of Common Pleas was considered in *Roop v. Meek*, 6 S. & R., 542, in which it was held that a writ of error did not lie to an order of court staying proceedings on a bail bond, though the suit thereon had been previously arbitrated and an award made in favor of the plaintiff. Speaking of the court's action in that case, it is said "they granted such relief as appeared to them to be agreeable to justice. In this and many other matters intrusted to judicial discretion, they are the sole judges of what is agreeable to reason and justice; and the exercise of that discretion cannot be reviewed in another forum." But without resting the decision on this technical ground, which was raised, but not pressed on argument, we think the learned Judge of the Common Pleas was correct in the general view he took of the case. The bail did not surrender their principal in time to exempt them from liability on their bond, the condition of which was that, "if the defendant shall be condemned in the action at the suit of the plaintiff, he shall satisfy the condemnation money and costs, or surrender himself into the custody of the sheriff, or, in default thereof, the bail will do so for him." Having failed to surrender their principal in time, the bail became fixed, and judgment was taken against them. The plaintiff had a right to rest on the judgment thus obtained, and might have refused to accept a surrender of the principal by his bail; but suppose they had afterwards proposed to surrender him, and the plaintiff had acceded to the proposition, it cannot be doubted that such acceptance would have released the bail and entitled them to equitable relief against the judgment. What was done in this case practically amounted to such acceptance. In pursuance of information given on behalf of the bail, the principal was taken at the instance of plaintiff and lodged in jail, where he remained until discharged by order of court. The plaintiff thus had all that he could have originally demanded of the bail—the body of the debtor. Having chosen, after the bail became fixed, to accept that which before that time would have fully satisfied the condition of their bond, it does not appear to be "agreeable to justice and reason" that he should be permitted to insist on more.

Waiving the question as to the plaintiff's right to have the action of the court below reviewed on a writ of error, we think the discre-

tionary authority of the court in the premises was rightly exercised, and, on the merits, both orders should be affirmed.

The rules were made absolute *upon payment of costs*. The record fails to show that this condition precedent was complied with, but, inasmuch as the learned counsel for both parties have taken it for granted that the costs were paid, we have assumed that such is the fact.

The orders of the Common Pleas are affirmed.

STUART v. BIGLER'S ASSIGNEES.

Defendant borrowed \$500 from A., and gave him six \$100 coupon bonds as collateral security. A. failed, made an assignment, and became a fugitive. *Held*, on a suit by A.'s assignee, that he must produce the collaterals or account for them before he could recover from defendant.

Error to the Court of Common Pleas of Dauphin county.

This was a judgment entered in favor of John A. Bigler against W. P. Stuart on single bill for \$525.10. Upon petition of W. P. Stuart the judgment was opened and the defendant let into a defense. Upon the trial the following facts appeared:

That William P. Stuart, on the 24th day of February, 1874, borrowed of John A. Bigler \$500, and gave his unindorsed note for the said amount on the same day, payable sixty days after the date thereof, and, at the same time, gave Bigler six \$100 coupon bonds of the Masonic Hall Association of the city of Harrisburg, numbered from 170 to 175 inclusive, payable in the year 1893, as collateral security for the payment of the said loan. Stuart paid interest on his said note twice: "Interest paid to July 24, 1874." "Interest paid to December 24, 1874." The transaction rested in this way until October, 1875, when Bigler placed said note in the hands of Eugene Snyder, his attorney, for collection. Notice was sent to Stuart, who called at Mr. Snyder's office, and, after a short conversation, on October 25, 1875, signed the judgment note for \$525.10, payable six months after date with interest, waiving exemption laws, etc., and lifted the original note. The same day judgment was entered of record in the Court of Common Pleas of Dauphin county to No. 444 of November Term, 1875.

On September 7, 1876, Bigler made an assignment for the benefit of his creditors to G. W. Porter and F. Jordan, and shortly afterwards became a fugitive. On April 20, 1876, the Masonic Hall property was sold by the sheriff for \$30,000 and the proceeds distributed among the mechanics' lien creditors *pro rata*.

On the 6th of November, 1879, Mr. Jordan,

assignee, wrote to Mrs. Stuart (wife of defendant below) informing her of the existence of the judgment here in question. This was the first intimation Stuart or any of his family had that this indebtedness was considered open and unpaid. The assignees had had frequent interviews with the members of Mr. Stuart's family before November 6, 1879, in reference to two other notes (on one of which he was bail), but nothing was ever said about the judgment in suit being open.

On the 20th of January, 1880, a petition was presented to the court by Stuart asking to have the judgment opened. On the 4th of February following the court opened the judgment and let the defendant into his defense. On the first trial the jury found (May 5, 1880), a verdict for plaintiff below for \$434.51. This plaintiff below asked the court to set aside, which was done.

The case was again tried, and on the 27th of November, 1880, the jury found for defendant below. This second verdict plaintiff below also asked to have set aside, which was done.

On January 24, 1881, and before the last trial, Stuart called on Mr. Jordan again, and tendered him in money \$717.46 (the debt, interest and costs in full), and demanded his bonds, but Mr. Jordan was unable to return them or even account for them, as they never had come to his hands; but he said that other bonds of same kind had been turned over to him among the assets of Bigler, and six of these he tendered, which were not accepted.

The case was again tried, and the jury on the 26th of January, 1881, rendered a qualified verdict, which the court directed to be entered as a verdict for plaintiff for \$690, without reference to the qualification, and after overruling defendant's motion for a new trial entered judgment on the verdict.

[The verdict returned by the jury was as follows: "Inasmuch as the honorable judge in his charge to the jury, says that they, the jury, have nothing to do with the bonds, we, the jury, while we believe that the bonds held as collateral should be returned to defendant, can do nothing more than render our verdict in favor of plaintiff, namely, the note to be paid with interest to date, amounting to \$689.10.]

The defendant presented, *inter alia*, the following points:

1. If the jury find, under the evidence, that on the 24th of February, 1874, the defendant, William P. Stuart, borrowed from John A. Bigler \$500, and delivered to him as evidence thereof his negotiable note for the amount, payable at 60 days, and also then delivered to said Bigler six coupon bonds, payable to bearer,

issued by the Masonic Hall Association of Harrisburg, for \$100 each, as collateral security for such loan, and that on the 25th day of October, 1875, the defendant, at the request of Eugene Snyder, attorney for John A. Bigler, delivered to the said attorney the judgment note in suit as further security for the said \$500, and received back from him his negotiable note, then the plaintiffs, being mere trustees for Bigler and his creditors, cannot recover unless they are able to surrender the six bonds.

2. If the jury find that the plaintiffs cannot surrender the identical bonds to defendant, they must, inasmuch as the six bonds were coupon bonds payable to bearer (title to which passed by mere delivery), satisfy the jury that they were not sold by John A. Bigler before they can recover their claim.

3. If the jury find that the bonds were saleable when, or at any time after, they were delivered to Bigler, the defendant is not called on to show a sale by Bigler, but the law imposes upon Bigler and his assignees the duty of producing the bonds or of proving that they were lost.

4. If the jury find that the assignees of John A. Bigler have found among his property other coupon bonds of said association, of like denomination as the six bonds given by defendant to Bigler as collateral, but have not found the bonds claimed by defendant, then it is for the jury to say whether from this fact they will or will not infer a sale of the said six bonds by Bigler.

5. If the jury find that the six bonds were received by Bigler as sufficient security for the \$500, and were afterwards sold by him, the plaintiffs must account for their proceeds; and if the jury find that neither Bigler nor his assignees have accounted for the proceeds of the sale of the bonds, they, the jury, may presume that John A. Bigler sold the bonds for enough money to satisfy his debt, and if they so find, the verdict must be for the defendant.

6. If the jury believe that the six bonds were worth \$600 when delivered to Bigler as collateral security for the sixty days' note, then the plaintiffs are bound to show that the bonds have not been sold to John A. Bigler before they can take advantage of their depreciation by substituting other bonds of said Masonic Hall Association of Harrisburg for said six bonds.

7. If the jury believe that Bigler received the six bonds as collateral security, and that at any time after receiving the same he could have (either rightfully or wrongfully) disposed of them for value, and said bonds are not produced here on the trial, and not accounted for, then it re-

mains for the jury to say whether, from these facts, Bigler did so dispose of the bonds, and if they find he did, then there can be no recovery here for whatever amount the jury find he may have received for them. And all this is a question of fact entirely for the jury. All of which were answered in the negative, which is assigned for error.

Opinion by PAXSON, J. Filed October 3, 1881.

The fact that the bonds deposited by the defendant below with John A. Bigler to secure the former's note for \$500, have become worthless, would not of itself constitute a valid defense to the note in suit. Bigler had no power to sell the bonds, and the defendant gave him no instructions to do so. Hence, if they remained in Bigler's hands, the depreciation thereof must fall upon the defendant. His remedy was to order their sale, or to pay his note and take up the bonds. It appears, however, that the bonds were not in Bigler's possession at the date of the assignment. They did not pass to the assignee as a part of the assets; nor have the assignees been able to find them after diligent search.

It is incumbent upon the assignees before they can recover against the defendant to produce the bonds, or account for them. This is sustained by abundant authority: *Ocean National Bank v. Faut*, 50 N. Y., 76; *Spaulding v. The Bank*, 9 Barr, 28; *Bank v. Peabody*, 8 Harris, 454; *Story on Promissory Notes*, 445, 448; *Edwards on Bills*, 503-4; *Smith v. Rockwell*, 2 Hill, 482. It is not a sufficient answer to say that as the bonds are now of no value, their non-production is *damnum absque injuria*. At the time they were deposited with Mr. Bigler, and for a considerable time afterwards, they were worth par. The fact that they were not in his possession at the time of his failure is evidence to go to the jury of a conversion of the bonds by Bigler. This, however, may be explained or rebutted by showing what he did with them. The burden of proving this was upon the plaintiffs below. This burden cannot be shifted upon the defendant by reason of Bigler's absence or the confusion in which he left his papers and his business generally. These are matters for which the defendant is not responsible.

During the trial below the defendant made a tender of the debt, interest and costs, and demanded his bonds. The plaintiffs were unable to produce the bonds, but produced and offered other bonds of similar character, identical with those in controversy save in the numbers. These the defendant refused. The tender of the bonds was not good for the reason that there was no

proof they had been continuously in Bigler's possession. They might have been purchased after they had become worthless. Had there been proof that the bonds offered to defendant had been in Bigler's possession from the time he made the loan to the defendant to the time of the assignment, it would have been sufficient under the authority of *Gilpin v. Howell*, 5 Barr, 41, where it was held that "where one purchases stock for another and takes a transfer on the books of the bank into his own name, it is sufficient if he always retain so much of the same stock as will enable him to transfer to his principal, on demand, the whole amount purchased for him; and that it is not necessary that he should retain the identical scrip or shares."

If, therefore, Bigler had always retained on hand six \$100 coupon bonds of the Masonic Hall Association of the city of Harrisburg as the collateral to defendant's note it would not matter that the defendant's bonds had by accident been mixed with other bonds of like character and disposed of to other parties. Under such circumstances the tender of any other six similar bonds would have been sufficient. As the case stands there is nothing to show that Bigler did not sell defendant's bonds at their face value and replace them with other bonds after their depreciation. It is not for the defendant to show a sale or conversion by Bigler if such be the fact. It is for the plaintiffs to account for the bonds. There is no hardship in this rule. They or their assignors are the only persons presumed to have knowledge of the transaction. When they attempt to perform this duty the defendant will have an opportunity of learning what became of his property.

I have indicated the principles which should rule this case without referring specifically to the numerous assignments of error. What has been said sufficiently covers the case.

Judgment reversed and venire facias de novo awarded.

FILLMAN'S APPEAL.

A service of a subpoena in divorce by the sheriff of another county than the one within which the proceeding is commenced, is valid without previous order of the court of original jurisdiction authorizing such service by the sheriff of another county.

A subpoena in divorce may be served by any one.

Appeal from the Court of Common Pleas, No. 3, of Philadelphia county.

Opinion by PAXSON, J. Filed January 16, 1882.

The service of the subpoena in this case appears to have been in strict conformity to the Act of Assembly. The libellant was domiciled

within the county of Philadelphia, and the proceeding for divorce was commenced there. The respondent resided in Montgomery county, and the subpoena was served by the sheriff of that county, who made the following return:

"Served Jacob Fillman, the within named respondent, by giving him, April 30, 1881, a true and attested copy of the within writ, and making known unto him the contents thereof."

Upon application to the court below the service was set aside, the learned judge saying: "The practice has been, ever since the time of Judge KING, to get an order from the court of original jurisdiction before the service can be made by the sheriff of another county."

This practice appears to be peculiar to the county of Philadelphia, at least, the contrary prevails in many other counties. This is the first time, so far as I have been able to ascertain, that the question of its validity has been before this court. Undoubtedly a service in accordance therewith would be good. But is a previous order from the court of original jurisdiction essential? If it is, many divorce proceedings throughout the State where the respondent has not appeared may be invalid.

The Act of 13th of March, 1815, P. 510, pr. 12, 6 Smith's Laws, 287, prescribes the mode of serving a subpoena in divorce. It requires that it shall be served personally on the party wherever found, or that a copy shall be given him or her fifteen days before the return of the same. There is nothing in the act, either by its express terms or by necessary implication, which requires a service by the sheriff. The subpoena is not directed to him, but to the respondent, and it may be served by any one. A service by the sheriff is the better service, and this course is usually pursued. In such case the return is more likely to be accurate. In either case, due proof is required to be made of the service. Here the sheriff made an affidavit of the manner of service, which is the due proof referred to in the act. The said act does not require a special authorization from the court of original jurisdiction, nor has any reason been shown why such order should be obtained.

It has been long the practice in this State for a defendant to move to set aside a sheriff's return when he believes the writ to have been defectively served: *Bujac v. Morgan*, 3 Yeates, 258; *Kleckner v. The County of Lehigh*, 6 Wharton, 66; *Winrow v. Raymond*, 4 Barr, 501. The respondent was therefore entitled to the rule; but it was error in the court below to make it absolute.

The order setting aside the service of the subpoena is reversed at the cost of the appellee.

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PITTSBURGH, PA., JULY 12, 1882.

Supreme Court, Penn'a.

PRUNER et al. v. BRISBIN et al.

In a suit of ejectment the actual location of certain warrants was disputed, and the court charged that some of the tracts having been surveyed in a block, and so returned, they must be located upon the ground as a block, and cannot be arbitrarily located in disregard of the lines and corners found upon other parts of the block. The jury was also instructed that all the lines and corners marked upon the ground and returned must be considered in ascertaining the proper location of the block. Those found upon any part of the block belong to every tract of which it is composed, and if sufficient lines and corners can be found, they determine the location of the entire block, without regard to its calls for adjoiners, or for waters, if such calls conflict with the lines actually run upon the ground and returned. The calls in a survey for waters, such as springs, ponds and streams, must be considered by the jury in determining its location, but the value of such evidence must depend upon circumstances. If the surveyor instead of going upon the ground, and there running and marking the lines, merely plotted the survey in his office, he could have little accurate knowledge of the location of the waters, and his call for them would be but slight evidence of their existence. *Held*, not to be error.

Two northern tracts of the block were represented as having streams crossing their respective northern boundaries, and flowing in that direction toward a creek, and by adopting the location contended for by the plaintiffs, these calls would be answered by streams actually upon the ground, but if the defendants' location be adopted the calls would not be answered. The court charged, if the northern line of the two tracts was run upon the ground by the surveyor who made the returns, these calls for streams would be important; but if the line was merely plotted, and not run upon the ground, the calls for the streams should have but little weight in determining the location of the surveys. Whether the northern or southern location be adopted, no surveyor has found the northern lines of the block on the ground. The fact that one of the blocks calls for a post at its northeastern corner would indicate that this line had not been run upon the ground. If it was not run, the calls for waters crossing it are not important or significant. *Held*, that under the circumstances and evidence, and considered with other portions of the charge, this instruction was not inadequate.

Kennedy et ux. v. Leibold, 7 Norris, 246, distinguished as inapplicable to a question of the location of a block by its own marks as returned to the land office, and not by calls of later surveys, or by marks found upon the ground younger than the date of original location.

Error to the Court of Common Pleas of Centre county.

Opinion by STERRETT, J. Filed October 3, 1881.

The controlling question of fact for the jury in this case was as to the true location of the four warrants under which defendants derived title. In July, 1793, three warrants, together with nine others, were located in a block, and patents for each of the tracts were afterwards granted to Richard Peters. The title under which the plaintiffs claim is based on two warrants, issued to them respectively in 1859, and surveys made in pursuance thereof in October of that year. If, as they contend, the land in controversy was then unappropriated, they were clearly entitled to recover; but, on the other hand, if it was included in the block of surveys made in 1793, it is equally clear the verdict was right. It was not denied that a survey of the thirteen tracts composing the block was made on the ground in 1793, but the dispute was as to where the warrants were actually laid. The location contended for by the plaintiffs is the width of two tracts or four hundred and sixty rods directly north of that claimed by defendants. Which of these is the true location was therefore the cardinal question in the case. The manner in which this and other questions of a subordinate character arose, and the principles of law by which the jury should be governed, in reaching a correct conclusion, were so fully and clearly explained to them by the learned judge who presided at the trial, that they could scarcely fail to have an intelligent understanding of the case. They were instructed, *inter alia*, that the thirteen tracts having been surveyed in a block, and so returned, must be located upon the ground as a block; that neither of them can be arbitrarily located in disregard of the lines and corners found upon other parts of the block. All the lines and corners marked upon the ground and returned must be considered in ascertaining the proper location of the block. Those found upon any part of the block belong to each and every tract of which it is composed, and if sufficient lines and corners can be found, they determine the location of the entire block, without regard to its calls for adjoiners, or for waters, if such calls conflict with the lines actually run upon the ground and returned. The calls in a survey for waters, such as springs, ponds and streams, must be considered by the jury in determining its location, but the value of such evidence must depend upon circumstances. If the surveyor, instead of going upon the ground, and there running and marking the lines, merely plotted the survey in his office, he could have little accurate knowledge of the location

of the waters, and his call for them would be but slight evidence of their existence. It requires neither argument nor citation of authorities to show that the learned judge was clearly right in thus instructing the jury.

The plaintiffs have failed to furnish us with the testimony as required by the rules of court. In so far, therefore, as it becomes material, we must be guided solely by such reference to the evidence as is contained in the charge of the court. Considering the assignments of error in connection with the charge as a whole, and in the light of the facts as therein presented, we fail to discern any error that would justify a reversal of the judgment.

It appears that the two northern tracts of the block, the Jacob Cox and Henry Shaffer, are represented as having streams crossing their respective northern boundaries, and flowing in that direction towards Clearfield creek, and that by adopting the location contended for by plaintiffs these calls will be answered by streams actually on the ground; but if defendants' location, four hundred and sixty rods further south be adopted, the calls are not answered. The plaintiffs regarded this as an important element in their case, and part of the charge relating thereto has been assigned for error. In calling attention of the jury to the subject, the learned judge said: "If the northern line of the two tracts was run on the ground by the surveyor who made the return, these calls for streams would be important; but if the line was merely plotted, and not run upon the ground, the calls for the streams should have but little weight in determining the location of the surveys. Whether the northern or southern location be adopted, no surveyor has found the northern line of the block on the ground. The fact that the Jacob Cox calls for a post at its northeastern corner would indicate that this line had not been run upon the ground. If it was not run the calls for waters crossing it are not important or significant." When considered in connection with other portions of the charge, wherein the principles applicable to the marks actually made by the surveyor, and found upon the ground, calls for adjoiners, streams, etc., are clearly stated and explained, the instructions complained of were entirely adequate. If they found it was, the calls for streams would be important. More than this, the plaintiffs had no right to ask, especially in view of the significant fact stated by the court, that "no surveyor has found the northern line of the block upon the ground." In the absence of the testimony, or anything to show that this statement was not warranted by the evidence,

we must accept it as an undisputed fact in the case. The other calls in the return of survey for the locust and the hemlock sapling on the northern line of the Jacob Cox and Henry Shaffer tracts were not entitled to much consideration if the line itself was not found on the ground by any of the surveyors.

In affirming defendants' sixth point the jury was properly instructed that the block of 1793, as returned to the land office, must be located by its own marks, and not by calls of later surveys, or by marks found upon the ground younger than 1793; that the location of the Drinkers, Barton, and other surveys of 1794, could have no weight in determining the location of the block in question. The instruction thus given is clearly right, and not in conflict with the principle recognized in *Kennedy et ux. v. Lewbold*, 7 Norris, 246, and other cases cited by the plaintiffs. In the first of these cases a question arose as to the admissibility of declarations made by two surveyors while professionally engaged, many years before, in the examination of monuments on the ground; and it was held that their declarations made at the time, as to the corners "found, blocked, and counted, were part of the *res gestæ*, and, so far from being doubtful evidence, were competent, and always admitted when the transaction was old and the surveyor dead." The principle has no application to the facts of this case as they are presented to us. The other authorities cited in support of the second assignment are also irrelevant to the question involved therein.

The defendants' ninth point was: "If the jury believe the testimony of defendants' witnesses, that the hemlock sapling, the locust, the hemlock, the hickory, the birch and maple on one line, the white oak, the double sugar, the hemlock, the pine and the hemlock on the other line, and the maple and the pine on the western end of the Benjamin Johnson, as defendants lay it, were on the ground marked as corners, dating to 1793, with lines to and from them of the same date, corresponding with the thirteen tracts, these corners and lines constitute the survey, control the call of the Casper Haines for the white oak and surveys of 1784, and the verdict must be for the defendants." There was an abundance of testimony on which to base this proposition and justify the submission of the same to the jury. One of the witnesses referred to in the charge of the court testified, that over fifty years ago he ran the lines of the block of surveys in question, and spent about a week in trying to locate the thirteen tracts from the call of the Casper Haines for the Anderson white oak, but could find no

lines or corners, corresponding with that location. The same witness testified, that he found the block well located by lines and corners on the ground, two tracts further south, and interfering very considerably with the Philips' surveys; that he there found several living corners corresponding with the returns of survey, and constituting a majority of all the corners called for in the block. If this and other testimony of similar import was believed by the jury, the fact was conclusively established that nearly all the lines and corners returned for the block of surveys in question were actually found upon the ground which the defendants claim to be the true location. It matters not that these lines and corners were found many years ago, before the inception of the plaintiffs' title. The question is, where was the block located in 1793; and the testimony of surveyors who went upon the ground for the purpose of ascertaining the lines and corners of the tracts composing the block, and there found the living line and corner trees, is undoubtedly entitled to great consideration. The lines and corners thus established, to the satisfaction of the jury, constituted the survey, controlled the call of the Casper Haines for the white oak and the surveys of 1781, and thus conclusively settled the vital question against the plaintiffs. It follows that there was no error in affirming the point, and the third assignment is not sustained.

There is no substantial error in either of the answers covered by the fourth and fifth assignments. The case appears to have been well tried, and we find nothing on the record that calls for a reversal of the judgment.

Judgment affirmed.

For plaintiffs in error, *Messrs. Geo. A. Jenks and Jas. A. Beaver.*

Contra, Messrs. Wallace & Krebs and Alexander & Bower.

GOERSEN v. THE COMMONWEALTH.

Where an indictment for murder charges that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased, without averring in what way or manner the murder was committed, it is sufficient. It is not necessary to set out the instrument or the specific agency used to accomplish the result.

The defendant was indicted for the murder of his wife, by poison as was averred. *Held*, that it was competent to show that the defendant poisoned his wife's mother a few days before the death of the wife and with the same description of poison; and this for the purpose of showing the design of the defendant to obtain their property, the intent and system by which that purpose was to be accomplished; connecting the death of both women with that purpose; and rebutting the theory that the death of the wife was the result of accident or

suicide, or the ignorant and negligent use of arsenic by either the wife or defendant.

It is error in a capital case for the court below in its charge to the jury to prominently present the theory and strong points of the prosecution and ignore those of the defense.

Error to the Court of Oyer and Terminer of Philadelphia county.

Opinion by MERCUR, J. Filed March 20, 1882.

The first assignment of error is the refusal of the court to quash the indictment. The complaint is that it does not aver in what way or manner the murder was committed. Such objection is without force, since the Act of 31st March, 1860. Section 20 thereof declares, "it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased." Section 11 provides "that every indictment shall be deemed and adjudged sufficient and good in law, which charges the crime substantially in the language of the act prohibiting the crime."

This indictment charges the murder in the language of the act to have been committed feloniously, wilfully and with malice aforethought. Conceding this to be so it is contended that the act is in conflict with Section 9 of the Declaration of Rights, which declares that in all criminal prosecutions the accused has a right to demand the nature and cause of the accusation against him. The argument is based on the assumption that "nature" and "cause" are equivalent to "mode or manner." They are clearly distinct. The nature and cause of a criminal prosecution is sufficiently averred by charging the crime alleged to have been committed. This must be done. The mode or manner refers to the instrument with which it was committed, or the specific agency used to accomplish the result. It is not necessary to aver either of these in the indictment. The 20th Section of the act is therefore not in conflict with the organic law: *Cathcart v. Commonwealth*, 1 Wright, 108; *Campbell v. Commonwealth*, 3 Norris, 187.

Whenever one before trial needs more specific information than is contained in the indictment to enable him to make a just defense, it may be obtained on proper application to the court.

The second specification is, to permitting the Commonwealth to give evidence of a separate and distinct offense from that for which the accused was being tried. If that other offense, in fact, was separate and distinct from the one charged in the indictment, it is important to consider the purpose for which the evidence was offered. It is true a defendant cannot be convicted of the offense charged merely because

he has committed another offense either of a similar or dissimilar kind. Hence, as a general rule, evidence of his participation in another independent and distinct crime, cannot be received simply for the purpose of proving his commission of the offense for which he is on trial: Wharton's Crim. Ev. 30; *Coleman v. People*, 55 N. Y., 90; *State v. —*, 15 N. H., 174; *Commonwealth v. Campbell*, 7 Allen, 542; *Shafner v. Commonwealth*, 22 P. F. Smith, 60.

It cannot be received to impeach his general character, nor merely to prove a disposition to commit crime. Yet under some circumstances, evidence of another offense by the defendant may be given. Thus it may be to establish identity; to show the act charged was intentional and wilful, not accidental; to prove motive; to show guilty knowledge and purpose, and to rebut any inference of mistake; in case of death by poison, to prove the defendant knew the substance administered to be poison; to show him to be one of an organization banded together to commit crimes of the kind charged; and to connect the other offense with the one charged, as part of the same transaction. The plaintiff in error was on trial for the murder of his wife by poison. The evidence of the death of Mrs. Souder was admitted under an offer to prove that she died by poison administered to her by him, while she was residing in his house, a few days before the death of his wife; that the arsenic administered to Mrs. Souder was of the same description as that found in the stomach of his wife; that the poison was administered to Mrs. Souder and to his wife in pursuance of a design on his part to obtain their property; to show his purpose and intent, and the system by which that purpose was to be accomplished; and to connect the death of both women with that purpose and intent; and also to rebut the theory that the death of Mrs. Goersen was the result of accident or suicide, or the neglect or ignorant use and administering of arsenic by either his wife or by him. These purposes clearly brought the offer within the rule permitting the evidence of the other offense to be given.

The third assignment is without merit.

The fourth assignment is to the charge of the court. The alleged errors therein are not assigned according to rule. Yet the whole charge was filed and comes up as part of the record duly certified. The complaint is twofold; the one in stating portions of the evidence incorrectly to the jury; the other an omission to adequately instruct them on the important questions fairly arising under the evidence. We will consider them separately.

1. The court said: "The only physicians who saw her, besides her husband, both pronounced her very ill, and recommended remedies, but neither of them was asked to call again, or to take charge of the case. Neither were the remedies recommended by them administered to her, showing, as the Commonwealth alleges, they were called in, as in the case of her mother, for the mere purpose of getting a certificate to bury her, and with no wish to effect a cure." A reference to the evidence shows that Dr. John R. Haynes visited Mrs. Goersen on the evening of Friday the 2d of April, and his brother, Dr. Francis S. Haynes, visited her on the evening of Saturday the third, and she died on Sunday morning the 4th of April. The former left a prescription for her. Sarah E. Souder, the attendant on Mrs. Goersen, and a witness called by the Commonwealth, testified that Dr. Goersen went for the medicine ordered by Dr. Haynes, came back and administered it to her once. On Saturday evening the other Dr. Haynes administered a hypodermic injection of sulph. morphia into her arm, wrote a prescription, gave directions for its use, and requested her to send Dr. Goersen over as soon as he came in. Dr. Goersen called on Dr. Haynes the same evening. The latter advised him not to administer the morphine powder if she became drowsy. Still later in the evening the doctor sent his brother, Robert W. Haynes, who told Dr. Goersen not to give the medicine if she was sleeping. Each physician pronounced her very sick when he visited her. Thus there was evidence to submit to the jury to find whether some of the medicine prescribed on Friday evening was not in fact administered, and if none was on Saturday evening, whether it was not in pursuance of the directions of Dr. Haynes, and not by reason of any improper motive of Dr. Goersen, and whether she was not then beyond the curative power of medical skill.

It is further complained that the court said: "Mrs. Souder, by her will dated the 8th day of March, had left all her interest in her deceased husband's estate to her daughter and the prisoner." An examination of the will of Mrs. Souder shows she devised to them only her "personal things and every thing in the house," and made no reference to the estate of her deceased husband. The will of her husband gave her nothing beyond a support or maintenance during her natural life. So she acquired from him nothing to devise.

2. This is not the case of an entire omission to charge on the law and the evidence beyond answering the points submitted on behalf of the plaintiff in error, for they were all affirmed.

The error consists in prominently presenting the theory and strong points of the prosecution and ignoring those of the defense. The defendant was a physician, and a person of intemperate habits; he kept medicines in a closet in his house. He was frequently in an improper condition to administer them. The Commonwealth proved by Sarah E. Souder that she held the lamp for him while he mixed and administered to his wife some medicine, which is claimed to have been arsenic; if so, in view of his habits, the question arose, was it administered intentionally or through gross negligence? There was evidence that on the day of her mother's funeral, and afterwards, Mrs. Goersen was despondent, and expressed the opinion that she would not live long. It also appears that at one time she had in her hand a small vial with skull and crossbones on it, and Dr. Goersen sprung and caught her hand and took it from her, telling the witness at the time there was poison in it. The counsel for the Commonwealth manifestly saw the force of these two aspects of the case. As has already been shown the evidence of the death of Mrs. Souder was admitted under its offer to rebut the theory of the death of Mrs. Goersen being the result of accident or suicide, or of the negligent or ignorant use or administering of arsenic by him or by his wife. Although the evidence given bore directly on these two theories, the learned judge omitted to bring any of the details thereof to the attention of the jury as questions worthy of their consideration. The burthen of proof rests on the Commonwealth to establish the guilt of the accused beyond a reasonable doubt, and therefore a duty rested on it to rebut all other reasonable theories that might be adduced from the evidence: *Turner v. Commonwealth*, 5 Norris, 54.

We are unable to discover any act on the part of Dr. Goersen tending to prove undue influence on the mind of Mrs. Goersen in the disposition of her property; on the contrary, the will which she executed appears to have been the result of a free exercise of her unbiased judgment and dictation by her when he was not present.

In view of the condition of Dr. Goersen, soon after the death of his wife, much importance should not be given to the fact of his unwillingness at first to have an inquest held on her body. It appears by the evidence of Charles A. Souder, an uncle of the deceased, that he talked to Dr. Goersen on the subject, that the latter asked "if I thought it best to have an inquest, and I advised one, and he said he was satisfied."

Without designating other omissions we think the substantial and controlling theories natu-

rally arising from the evidence, were not, as they should have been, presented to the consideration of the jury. The charge inaccurately presented the case in view of the circumstantial character of the evidence and the gravity of the crime charged. The fourth specification is sustained.

Judgment reversed and venire facias de novo awarded.

For plaintiff in error, *Messrs. Edmund Randall and Wm. H. Ruddiman.*

For Commonwealth, *Messrs. Geo. S. Graham and Henry S. Hagert.*

MILLER'S APPEAL.

A fire insurance company was organized in 1869 with 2,000 shares of stock of \$50 each, of which 1,306 were subscribed to, payable in cash. Afterwards the remaining 694 shares, in 1870, were subscribed to by the officers and directors of the company by giving their notes for \$25 a share. The notes were deposited in bank, where they remained until the insolvency of the company, when, upon resolution of the board, they were returned to the parties, and the stock re-transferred to the company. The arrangement was made to meet the insurance commissioners' examination, and the notes appeared as part of the assets in the public statements. *Held*, the transaction was a fraud upon the company, and that, as between these note stockholders and the company, in a suit by the creditors, requiring them to make good their subscriptions, in the absence of any agreement to the arrangement by the cash stockholders, they are liable.

Appeal from the decree of the Court of Common Pleas of Lycoming county.

Opinion by PAXSON, J. Filed October 3, 1881.

It is not denied that both classes of stockholders of the Williamsport Fire Insurance Company are liable to creditors of said company. The contention is, whether the "cash stockholders" or the "note stockholders" as they are called for convenience, are primarily liable. The company was organized in 1869 with an authorized capital of \$100,000, divided into 2,000 shares of \$50 each. Of these shares 1,306 appear to have been subscribed for, \$25 per share paid thereon, and the company commenced business. In the month of January, 1870, the remaining 694 shares were subscribed for by the officers and directors of the company, who respectively gave their notes for \$25 per share. These notes were by special order of the board handed to the president of the company, and by him deposited specially in the West Branch Bank, where they remained until some time in 1873, when, in pursuance of a resolution of the board, all of said notes were returned to the parties, and the stock re-transferred to the company. At this time the latter had become

insolvent. This stock is what has been referred to as "note stock."

The above arrangement was altogether a peculiar one. Its avowed object was to enable the company to undergo an inspection by the insurance commissioners. Its practical effect was to create the impression that the stock was all sold and fifty *per centum* paid up thereon. The notes referred to appear as a part of the assets of the company in its published statements. That the transaction was a fraud upon creditors was conceded; indeed, it is too plain a proposition to dignify by an argument or the citation of authority. It was contended, however, that it was good between the note stockholders and the company; that as it was intended for the benefit of the latter, and was done in entire good faith, the company cannot question it after having returned the subscribers their notes, and accepted from them a surrender of the stock. Conceding all that can be argued in support of this proposition, it fails to meet the requirements of the case. It is the creditors of the company who are now demanding that the note stockholders shall make good their subscriptions. Have the latter any such equity as entitles them to throw the burden of this call upon the shoulders of the cash stockholders? It may be if the cash stockholders had assented to the arrangement made by the note stockholders, as between themselves, they might have been bound by it. But no such assent appears upon this record, nor does the master find they had knowledge of it. The facts from which he impliedly infers such notice are too weak and inconclusive to affect the cash stockholders. It is true the matter appears upon the minutes of the board, but there is nothing to show that the stockholders ever saw them. This is a matter between the officers and directors and a portion of the stockholders. While the action of the former in the line of their duty, and to the extent of their powers, binds the corporation, the stockholders are not affected with notice of acts of commission or omission of the board of directors, which are *ultra vires*. This transaction briefly stated was an appropriation by the officers and directors of the 694 shares of stock to themselves. If the company proved successful they would have the benefit of any advance in the market value of the stock, and could draw the dividends. If, on the other hand, disaster overtook it, they could return the stock and get back their notes. This is just what was done.

Whatever may have been the motive, it is too plain for argument that this fast and loose arrangement gave the note stockholders an unfair advantage over the cash stockholders. And we

cannot say that it worked no injury. The fact that the stock was apparently all sold may have induced persons to purchase stock in the market who would not otherwise have done so. Then again, the note stockholders participated in the dividend of July, 1870, and to that extent the cash stockholders were injured.

We are of opinion that both classes of stockholders are responsible to the creditors, and that neither has an equity to throw such burden upon the other. The cash stockholders having paid up \$25 per share on their stock, the note stockholders are primarily liable until they have respectively paid up a like amount. After that *pro rata*.

The other questions raised by the assignments of error were not pressed at the argument and need not be discussed.

The decree is reversed at the costs of the appellee, and it is ordered that the record be remitted for further proceedings.

WOLCOTT v. SCHWARTZ AND WIFE.

An affidavit of defense should directly and unequivocally deny that the services charged for were rendered. A general averment that the charges are excessive is insufficient. It should aver what part or portion of the charge is excessive.

Error to the Court of Common Pleas, No. 1, of Philadelphia county.

PER CURIAM. Filed January 30, 1882.

The affidavits of defense are evasive and insufficient. The copy of the book account filed shows the claim to be for nursing the plaintiff in error in his sickness. While the affidavits deny the defendant in error "ever acted in the capacity of nurse to him," yet they are careful not to deny she nursed him. It matters not that he did not contract with her to perform such duties. If she rendered the services named the law implies an obligation on his part to pay for them. His averment that the charges are excessive for such services is too general. He does not aver what part or portion of the charge is excessive. *Judgment affirmed.*

Orphans' Court.

ROBERT MCCREADY'S ESTATE.

Execution Attachments of an inheritor's interest in real estate in the hands of an administrator or trustee in partition of a decedent's estate, under Act of April 13, 1843, Sec. 10, and Act of April 10, 1849, Sec. 11.

Robert McCready died intestate and seized of

real estate, in Allegheny City, Pa. Margaret Armstrong took out letters of administration on his estate, March 26, 1869. In partition of said real estate, the administratrix was appointed and directed, March 9, 1881, to make sale thereof, but on April 23, 1881, she filed her declination of said appointment, and A. K. Stevenson, Esq., was thereupon appointed trustee to make sale, and who now brought the proceeds of sale into court for distribution.

Before the auditing judge the right to the distributive share of John W. McCready (who was a son of decedent) was disputed between Thompson & Co. and Mala McCready.

It appeared that Thompson & Co. obtained judgment January 3, 1872, against "W. J. McCready & —, doing business as the firm of W. J. McCready & Co." for \$450. Execution issued to March Term, 1872, and was returned *nulla bona*. An attachment execution was issued March 23, 1881, on above judgment, under Act of April 13, 1843, Sec. 10, Purd., 640, "against W. J. or J. W. McCready," which was executed March 24, 1881, by attaching all his right, title, etc., to said real estate in Allegheny City in the hands of Margaret Armstrong, administratrix, and summoned her as garnishee. Her answers admitted that said real estate was in her hands for sale in partition when the attachment was executed, but that she had since declined the appointment to make sale and the court had appointed A. K. Stevenson, Esq., trustee, to make sale in her stead.

Thompson & Co. then issued a second attachment on said judgment "against Wm. John McCready," which was executed May 6, 1881, by attaching said realty in the hands of A. K. Stevenson, Esq., trustee. The defendant moved to dissolve this attachment because the original judgment had not been revived. The court refused the motion because an attachment may issue without a *scire facias* to revive (*Ogilsby v. Lee*, 7 W. & S., 444; *Gemmell v. Butler*, 4 Barr, 232, and *Swanger v. Snyder*, 14 Wright, 223), and also because a *fleri facias* had been issued and returned *nulla bona* (*Dodge v. Casey*, 1 M., 13; *Shaw v. Richards*, 2 Id., 103; *Landouzy v. Seelos*, 4 W. N. C., 151), and upon their answers entered judgment against the garnishees in each case, to be levied of the property, distributive share, etc., of Wm. John McCready, the defendant, in their hands.

Mala McCready was the owner of a judgment obtained December 11, 1871, "against J. W. McCready" for \$2,537 and revived June 10, 1881, by an amicable *scire facias*. An attachment execution issued thereon and was executed June 13, 1881, by attaching said realty in the

hands of said trustee, upon whose answers judgment was entered against him as garnishee, to be levied of the property, etc., of J. W. McCready in his hands. Afterwards the trustee made sale, whence this fund arose.

For Mala McCready, *Messrs. Robb & Fitzsimmons*.

The record of Thompson & Co.'s judgment proves that it was against a partnership and is a partnership debt. Our judgment is a personal one. The estate to be distributed here is the private personal estate of J. W. McCready. Where there are partnership and separate creditors the rule is, "the separate estate to the separate creditors:" Gow on Part. 308; *Walker v. Egth*, 1 Casey, 216-218; *Singizer's Appeal*, 4 Id., 525-527; *Black's Appeal*, 8 Wright, 509; *Houssal & Smith's Appeal*, 9 Id., 484. Thompson & Co.'s attachment did not become a lien until the realty was converted into personalty by the sale, which was *after* the revival of our judgment. Moreover, Thompson & Co.'s judgment was erroneously entered against W. J. instead of J. W. McCready. This is fatal to the attachment and cannot be cured or corrected therein.

For Thompson & Co., *Wm. Yost, Esq.*

Our attachments became liens on the realty from service: Act of April 13, 1843, Sec. 10; Act of April 10, 1849, Sec. 11; *Straley's Appeal*, 7 Wright, 89. Even if our judgment were for a partnership debt, "a judgment against a firm is a lien on the separate real estate of the partners and is entitled to priority over a subsequent judgment of a separate creditor of a partner whose real estate was sold:" *Cumming's Appeal*, 1 Cas., 268. The defendant was known by both names and hence might be sued by either: Gould on Pl., ch. 5, Secs. 69, 71. But the defect, if any, was cured in the attachment by both names. It is sufficient if it *warns* the garnishee. See *Paul v. Johnson*, 9 Phila., 32; *Rushton v. Rowe*, 14 P. F. Smith, 63; *Bentley v. Kaufman*, 34 *Legal Intell.*, 12. Trustees in partition are not such "officers" as to be exempt from an attachment: *McPherson v. Snowden*, 19 Md., 190; and trustees are mentioned in the latter part of Section 11 of Act of April 10, 1849, as being within the purview of the original act. The administratrix has now only constructive possession of the fund, but that is sufficient to sustain the lien of the attachment: *Harper v. Valentine*, 4 W. N. C., 38. See, generally, *Atterson v. Gallagher*, 6 Id., 555; *Gochenaur's Executor*, 6 H., 420; *Lorenz v. King*, 2 Wright, 93; *Chambers v. Baugh*, 2 Casey, 105; *Bank v. Ralston*, 7 Barr, 482.

Opinion by OVER, J. Filed February 28, 1882.

It appears from the evidence that one of the children of the decedent was known by the names of J. W. McCready and W. J. McCready, his baptismal name being John.

Thompson & Co. on their judgment obtained against him under the name of W. J. McCready, issued an execution attachment against both W. J. and J. W. McCready, at No. 76 June Term, 1881, on which was attached his interest in the decedent's real estate. And by virtue of this attachment they acquired a lien on the same: *Straley's Appeal*, 43 Pa. St., 89; *Neely v. Grantham*, 58 *Id.*, 433. As this attachment was issued against him under both names, and was executed prior to the attachment issued on the judgment of *Mala McCready v. J. W. McCready*, it has a prior claim to that attachment on his distributive share of the fund.

The fact that the judgment of Thompson & Co. was obtained against W. J. McCready, doing business as W. J. McCready & Co., is not material, (1) because this is not a distribution of an insolvent's estate, and (2) because they obtained a lien on the real estate out of which the fund for distribution arises before its conversion into personality.

Court of Quarter Sessions, York County.

COMMONWEALTH v. WASSON.

The Act of 17th April, 1876, which provides "that it shall be unlawful for any person except physicians or surgeons to engage in the practice of dentistry, unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught, or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this act to issue such a certificate," and then provides a penalty for this offense, and afterwards except those who have been in continuous practice for three years, applies to persons practicing at the time of its passage.

The defendant was convicted of the offense described in the above act. At the time of its passage, he was a practicing dentist, though for a less term than three years. *Held*, that the act deprived the defendant of his property or estate in his possession, which he enjoyed at the time of its passage, in some other way than by the "Judgment of his peers or the laws of the land."

The act, as far as this defendant is concerned, imposes a punishment for an act which was innocent when done, and is therefore *ex post facto*, within the constitutional provision.

The act, so far as this defendant is concerned, would prevent his pursuing a profession for which he had fitted himself, on which his livelihood depended, and which he was following at the time of its passage. This is an attempt to punish him for an act done prior to the statute, and hence unconstitutional.

Motion in arrest of judgment.

Opinion by WICKES, P. J. Filed February 20, 1882.

The defendant in this case was indicted for practicing dentistry in violation of the provisions of the Act of April 17, 1876, P. L., 39. It provides, *inter alia*, as follows: That it shall be unlawful for any person (except physicians and surgeons) to engage in the practice of dentistry, "unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught" * * * or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this act to issue such certificate.

Sec. 6, provides for indictment in the Quarter Sessions, and a penalty of not less than fifty nor more than two hundred dollars; it further provides for the recovery by the patient or his heirs of all fees that shall have been paid for services rendered in violation of this act.

Sec. 8, provides that the provisions of the act shall not apply to persons who "have been engaged in the continuous practice of dentistry in this State for three years or over at the time or prior to this act."

The defendant had never been graduated from an institution where this specialty was taught, nor had he ever appeared before the board of examiners appointed under the act—he had therefore, received no diploma or certificate. He was, however, engaged in the practice of dentistry at the time the act was passed, but for a less period than three years. Upon this state of facts we are asked to arrest the judgment: (1) Because the act was not intended to apply to persons practicing at the time of its passage, although for a less period than three years, and (2) Because if so intended the act is unconstitutional and void as to them.

We think the first position is not tenable because it would seem to be a necessary implication from the section which provides that the act shall not apply to those who have practiced three years prior to its passage, that it was intended to embrace all those who have been so engaged for a less period of time. It is said we must read the statute as if it did not contain that proviso at all, but it is an established rule in the exposition of statutes that the intention of the law giver is to be deduced from a view of the whole and of every part of a statute taken and compared together, and although the act in question is highly penal in its character and retroactive (14 P. F. Smith 495 and 17 *Id.* 485), we cannot get rid of its plain phraseology and read out of it words which clearly indicate the intention of the Legislature.

The second proposition, however, presents a much more serious question.

It must be conceded upon principle and authority, that among the rights reserved to the States, is the right to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its limits, and it is not questioned in this case, that the act in controversy is quite within the reserved power of the State so far as it is prospective in its operation; nor is it said to be unconstitutional simply because retrospective in its action, for such legislation is nowhere prohibited, unless it works the destruction of rights previously attached, or has some other effect prohibited by the fundamental law. Is the act in question, so far as it applies to this defendant, open to objections of this character?

The fundamental law of the United States, and of the State of Pennsylvania, alike prohibit the taking of the citizen's life, liberty or property, unless by the judgment of his peers or the law of the land.

They also prohibit the passage of any *ex post facto* law or bill of attainder. If, therefore, the act under which the defendant was indicted, does one or the other or all of these, either directly or indirectly, it cannot be permitted to stand, and it will not save the statute to say that it was passed in pursuance of that power which the State may exercise over matters of internal police.

Is a man's profession or employment his property? and what do we mean by judgment of his peers or the law of the land? In the case of *Cummins v. The State Missouri*, 4 Wall., 277, the Supreme Court said: "The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. * * * He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors." The learned counsel who appeared for the Commonwealth conceded the defendant's right to practice his profession, as property in legal contemplation, but the argument proceeded on the ground that the process by which it is sought to deprive him of it, is what the constitution means by "due process of law."

But I do not so understand it. Said THOMSON, J., in *Fetter v. Will*, 10 Wr., 460: "'Judgment of his peers,' is a term of expression borrowed from *Magna Charta* and it means a trial *per pais* or by the country, which is a trial by jury. The words 'or the law of the land,' have the same origin and are to the same effect as

'due process of law' in the bill of rights in the Constitution of the United States, and it means judgment of the law in its regular course of administration through courts of justice."

The question before the court in that case was the constitutionality of Act 22d April, 1822, which authorized the seizure and sale of the enumerated articles, if used for traffic within three miles of any place of religious worship during the time of holding any meeting for that purpose. "Nothing (said the court) more despotic could be imagined than the power claimed under the Act of Assembly." And yet it did not more completely forfeit the rights of property "without due process of law," than does the act before us. Indeed, it was far less severe in its provisions, because it imposed no restraint upon the offender's right to continue his business elsewhere, whereas the act in question must result in driving persons, situated as is the defendant, from the further prosecution of his profession.

"Due process of law," means not a legislative but a judicial act. The judgment of the law as expressed through the courts can alone produce the effect here sought to be given to an Act of Assembly.

It is no answer to say, as was said at the argument, that the prosecution now pending is the "due process of law" contemplated by the constitution. It rather proceeds upon the theory that the defendant's rights have also been swept away by legislative enactment, and that nothing remains to him but the annihilation of his business, or submission to the pains and penalties imposed upon him by the statute.

We can but think, that the effect of the act is to forfeit the estate of the defendant in his profession—to destroy a vested right which he enjoyed at the time it was passed, and thus deprive him of his property by a process rather ministerial than judicial, and wholly different from that which is meant by the "judgment of his peers or the law of the land."

But apart from this view of the question, we are of opinion that this act of 1876, so far as it applies to the defendant, imposes a punishment for an act which was innocent when done, and is therefore *ex post facto*, within the constitutional prohibition.

Said Chancellor KENT, in defining *ex post facto* laws: "All laws passed after the act and affecting a person by way of punishment in his person or estate, are within the definition." And said the court in *Colden v. Bull*, 3 Dale, 386, "every law that makes an action done before the passage of the law, and which was innocent when done, criminal, and punishes such

action" is *ex post facto*, and of course within the inhibition contained in the constitution. But we are told there is no attempt here to punish the defendant for any act done by him prior to the statute, and that it was only necessary for him to abandon the practice of his profession to avoid the penalties prescribed.

Can it be that there is no punishment inflicted by an act which takes away from a man the profession or employment upon which his livelihood depends? Which in effect says to him: "True, you have spent your time and money in preparing yourself for this profession, and you engaged in the practice possessed of all the qualifications required to satisfy the existing laws and commend you to the public, but since then we have discovered that the public welfare requires that such skill as you profess shall be avouched by a diploma, and as you have not got it, and did not require it, we make this law relate back to the time you began to practice, and you must pay the forfeit, or abandon your occupation, upon which the support of your family depends—your act was innocent before this law was passed, but we make the continuance of it criminal."

This was substantially the argument addressed to the Supreme Court of the United States in *Cummins v. The State of Missouri* before referred to. The Constitution of the State provided a test oath, which in form created a qualification for office, and attached certain conditions as essential to the right of the citizens to engage in the various professions, callings and pursuits enumerated in the act. No one questioned the right of the State to prescribe these qualifications and conditions, but when it was attempted to apply the test to those already engaged in the employments mentioned, it was held to be in the nature of a bill of pains and penalties, and to inflict a punishment within the meanings of an *ex post facto* law.

Said Mr. Justice FIELD, delivering the opinion of Court: "Disqualifications from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as executor, administrator or guardian, may also, and often has been imposed as a punishment. * * * Punishment is not restricted to the deprivation of life, liberty or property, but also embraces deprivation or suspension of political or civil rights."

The court then proceeded to inquire whether such punishment was within the constitutional prohibition, and after elaborate research and argument it was held to be a bill of pains and

penalties, and *ex post facto* within the meaning of the constitutional prohibition, that "no State shall pass any bill of attainder, or *ex post facto* law."

Said the court: "The theory upon which our political institutions rest is, that all men have certain inalienable rights, that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all homes, all positions are alike open to every one, and that in the protection of these rights all are equal before the law."

It were vain and futile so to declare if the qualifications for these avocations may be added to or changed time and again, perhaps in the interest of some dominant class, until under the guise of the public weal, all opposition is driven from the field.

In the cases referred to, there was nothing to prevent the prescribed class from discontinuing their employment and engaging in some other pursuit not guarded at its threshold by an impossible condition; but the court said in effect, no, this is practically punishment for past conduct, and no matter under what form presented, it is an attempt to sweep away the constitutional rights of the citizen before the dangerous front of bare-faced power.

Nor does it save the obnoxious features of the act in question, that those affected by it, may appear before the board of examiners it creates. If the statute did not forfeit their rights, there would be no necessity for a method by which to reinstate them.

In the case we are considering, no punishment for past conduct may be intended; certainly no act criminal in itself was committed by the defendant, under the law as it stood prior to the enactment of this statute. Indeed, it may be conceded that the act was passed entirely in the interest of the public, and will produce the best practical results. It, nevertheless, operates disastrously upon a class, whether so intended or not. It drives from their established business, men of mature years with their family ties and dependencies, and remits them to the hall of some "reputable institution," or sends them before a "board of examiners" armed with the absolute power to end their professional careers.

We can but think such legislation is retrospective in a sense which renders it void, because it has an effect prohibited by the fundamental law. We therefore arrest judgment.

For motion, *G. W. McElroy, Esq.*

Contra, Messrs. E. D. Ziegler and W. F. Bay Stewart.

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Supreme Court, Penn'a.

ETTINGER v. THE COMMONWEALTH.

Whether a witness for the prosecution was an accomplice is, if disputed, a question of fact for the jury.

Testimony as to the *res geste* is competent for the purpose of corroborating such witness.

Even in the case of an acknowledged accomplice, corroboration need not extend to the whole of his testimony. It is not strictly correct to say that no conviction shall be had upon the unsupported testimony of an accomplice. It is competent for the jury to convict upon such testimony. But it is the practice for the court to admonish the jury of the danger of and advise against such a conviction.

When a man at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury.

Error to the Court of Oyer and Terminer of Snyder county.

Opinion by STERRETT, J. Filed October 3, 1881.

It was incumbent on the Commonwealth to establish the *corpus delicti* as well as the participation of the prisoner in the murder. A careful examination of the testimony returned with the record, and referred to in the charge of the court, leads to the conclusion that it was amply sufficient for both purposes.

It was exclusively the province of the jury to consider the testimony, pass upon the credibility of the witnesses, and determine the truth of every material allegation on which the Commonwealth relied; and, inasmuch as it was fairly submitted to them in a clear and comprehensive charge, to which no exception is taken, it must be conclusively assumed that all the ingredients of murder of the first degree were fully proved to the satisfaction of the jury. The testimony of Mary Hartley, the principal witness for the prosecution, was direct and positive, both as to the commission of the crime and the prisoner's active participation therein. After giving a somewhat detailed statement as to how the parties came together on the night in question, and what occurred on the way to Kintzler's, she proceeds to state in her own way what took place there. The following is the

substance of her testimony as to some of the more prominent facts: When they reached the fence east of the house the prisoner ordered her to remain there, saying that Kintzler had cross dogs, and if he was not in bed he might shoot. In company with his male companions they crossed the fence, and, after securing one of the dogs and tying him to a stake at the fence, he returned to the house. The witness afterwards heard a crash of broken glass and saw the prisoner making a fire on a large stone in front of the house. He then drew from under his vest a short-handled ax, with which the door was forced open, and they all rushed into the house. In company with Ellen Moyer the witness then crossed the fence, for the purpose of seeing, as she says, what was going on; and, on reaching the house, she saw Mr. Kintzler lying on the floor near the stove, and saw the prisoner strike Mrs. Kintzler on the head with a club and knock her down, as she was attempting to escape. The box containing Kintzler's money was then secured, and, after dividing the contents by the light of a pine torch, they threw the box, together with some pennies, etc., back into the house. The prisoner then scraped some of the blood from the floor into a piece of crock, and, after emptying it on the ground at the east side of the house, threw the crock into the woods towards Shraders. The diabolical work was then completed by setting fire to the house, and all the parties withdrew.

Such is the substance of the more prominent facts to which she testified, without attempting to give the language of the witness. Several witnesses were examined as to the condition of the premises next morning when the fire was first discovered. The house was then nearly consumed, and in the ruins several persons saw what they believed to be the remains of the old people. They were taken out and afterwards examined by experts and others who testified on the trial. The testimony on this subject is such as to leave no doubt as to their identity. It was also shown that blood was found at the east end of the house, and some of the witnesses testified in regard to the hole under the floor, in which Mr. Kintzler kept his money box, and also as to where the dogs were found. In addition to this it was shown that the prisoner, while in the Middleburg jail, admitted to Joseph Wagner that he helped to kill the Kintzlers; and after they were taken to the Eastern Penitentiary he made a more detailed statement to Wagner, in which he said, the old woman came running out and he knocked her down, and one of his companions killed her; "that they took the money out, carried leaves in and set the

house on fire," etc. Other testimony, tending to prove the guilt of the prisoner, was submitted to the jury, but it is unnecessary to dwell further on the facts of the case. They have been sufficiently brought to notice to show that if the witnesses were believed by the jury, the verdict, both as to the prisoner's guilt and the grade of the crime, was fully warranted. The only question that is not conclusively settled by the verdict is whether any of the testimony complained of in the assignments of error should have been excluded. Unless there was substantial error in that regard, it is very clear that the verdict and judgment should not be disturbed.

The first assignment relates to the admission of testimony to prove that on the morning after the alleged murder a pool of blood was found on the east side of the house, where, according to the testimony of Mary Hartley, the contents of the broken crock had been emptied the night before. She had testified fully as to what had occurred in the night in question; among other things, that the prisoner scraped some of the blood into a piece of crock and emptied it on the ground at the east end of the house, so that the people might think the Kintzlers had been killed outside the house, and thus the probability of a search for their remains in the ruins would be lessened. In connection with other evidence, the testimony complained of tended to show that the condition of things on the night of the alleged murder, as testified to by Mary Hartley, was correctly represented by her, and thus to some extent her statement of what occurred was verified by witnesses who visited the premises early next morning. On behalf of the prisoner it was urged that, according to her own version of the transaction, Mary Hartley was an accomplice, and, therefore, unworthy of belief. This was denied by the prosecution, but still it was a question for the jury to pass upon, and in view of the circumstances, it was competent for the Commonwealth to verify, as far as possible, her statement as to the *res geste*. This was properly done by the testimony of witnesses who came upon the ground immediately after the occurrence, and while the means of verification existed. In the case of an acknowledged accomplice it is well settled that corroboration need not extend to the whole of his testimony. If it is shown that he has testified truly in some particulars, the jury infer that he has done so in others. We think, therefore, that the testimony was not incompetent for the purpose for which it was admitted.

In his instruction to the jury as to the effect of Mary Hartley's testimony, in case they found she was an accomplice, the learned judge gave

the prisoner the full benefit of the law, and even more, by saying: "The practice is well settled that no conviction shall be had upon the unsupported testimony of an accomplice." This statement of the rule is not strictly correct, in theory at least. The degree of credit that should be given to an accomplice is a matter exclusively within the province of the jury. It is competent for them to convict on his uncorroborated testimony, but the source of such evidence is so corrupt that it is deemed unsafe to rely upon it alone, and hence it is the practice of courts to admonish the jury of the danger and advise against a conviction on the testimony of an accomplice, unless he is corroborated to some extent, especially as to the person of the party he accuses: *Wilson et al. v. Commonwealth*, 28 PITTSBURGH LEGAL JOURNAL, 89. The principle which allows the testimony of an accomplice to go to the jury for their consideration, necessarily involves their right to believe and act upon it. The general rule appears to be that, notwithstanding the admonition and advise of the court, the jury may, if they see fit, act upon the evidence of the accomplice and convict without any corroboration of his statement, but in practice such a thing seldom occurs.

The second assignment is not sustained. Mary Hartley testifies that after the murder the prisoner and one of his companions crawled under the bed and brought out the box containing the money. It appeared by other testimony that in the ground immediately under the floor where the bed stood, there was a hole in which the box was secreted, and that access was had to it through a trap-door in the floor at that place. Several witnesses had testified, without objection, to having seen the hole on the morning after the fire, and subsequently; and then the witness, Mr. Smith, was called to prove that he was there about two months after the occurrence, and the hole was still visible. The objection was not to the character of the testimony, but that in point of time it was "too remote to furnish any evidence of corroboration." The learned judge, in overruling the objection, remarked that testimony had been given of the existence of the hole at the time of the fire and for some time after, and that the witness was competent to speak of its being there for a period of two months afterwards; and, though the evidence was very slight, he thought it a circumstance for the jury. There was nothing wrong in this. The objection to the offer was groundless, and there was no error in overruling it.

The testimony to which the third assignment relates was admitted, as the learned judge says

in his ruling, on the authority of the principle stated in Wharton's American Law, and cases there cited, viz: "When a man at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury." The testimony shows that on several occasions when they were together in the Eastern Penitentiary, the witness accused the prisoner of killing the Kintzlers, and the latter made no reply. The circumstances under which the accusation was made were so well calculated to elicit a reply that we are not prepared to say that the silence of the prisoner was not a circumstance, though very slight, for the consideration of the jury. Silence, under certain circumstances, may amount to a tacit admission of guilt. It is said in Roscoe's Criminal Evidence, 152: "Besides the proof of direct confessions, the conduct or demeanor of a prisoner on being charged with a crime, or upon allusion being made to it, is frequently given in evidence against him." The Commonwealth had proved that on a previous occasion, when in company with Joseph Wagner and others in the Middleburg jail, the prisoner expressly admitted to Wagner that he helped to kill the Kintzlers. This was proved by Wagner, who also testified that he then told him "he had better keep his mouth shut, that the sheriff might hear." On that occasion the witness, Thomas Jordan, was present as a fellow-prisoner in the jail, but it appears from the testimony that he was then asleep and did not hear the admission testified to by Wagner. Again, after the prisoner, Jordan and Wagner were taken to the Eastern Penitentiary, there was, according to Wagner's testimony, another conversation in which he represents the prisoner as saying that, "as soon as they came to the house, he threw in chloroform, and with the same ax he stole across the mountains he cut the door open. He went in then, and Kintzler got up and he knocked him down, and old Erb killed him; and the old woman came running out and he knocked her down, and Jonathan Moyer killed her. He said that he knocked down both of them, but he did not do it to kill them. Then he told me that they took the money out, and carried leaves in and set the house on fire and burnt it, and then they divided the money and went home." This is an extract from the testimony of Wagner, as we find it in the official report of the evidence. It appears that the Kintzler murder was the subject of conversation and accusation while the parties named were fellow-prisoners in jail

and afterwards in the penitentiary. The credibility of the witness was for the jury, and we see no impropriety in admitting testimony as to what was said and done by the prisoner in relation to the subject. His admissions, and his conduct when accused of participation in the murder, were, under the circumstances, competent evidence.

The fourth and fifth assignments may be considered together. They relate to the finding of pieces of crock in the woods where Mary Hartley testified the crock was thrown on the night of the murder, and present substantially the same question that is raised by the only assignment of error in *Moyer v. The Commonwealth*, just decided. For reasons given in the opinion filed in that case, the assignments are not sustained.

The testimony complained of in the two remaining assignments, was not improperly admitted. Neither of these assignments requires special notice. They are not sustained.

After a careful examination of the record, including the official report of the testimony returned therewith, we have failed to discover anything that would justify a reversal of the judgment which was pronounced after a full and fair trial.

Judgment affirmed, and it is ordered that the record be remitted to the Court of Oyer and Terminer of Snyder county for the purpose of execution.

ERB v. THE COMMONWEALTH.

On a trial for murder, if the controlling motive of the prisoner was to obtain possession of the husband's money, and in so doing, both husband and wife were murdered, it cannot be doubted that, on the trial for the murder of either, the motive which led to the commission of the double crime may be shown.

See *Eltinger v. The Commonwealth*, ante, p. 437.

Error to the Court of Oyer and Terminer of Snyder county.

Opinion by STERRETT, J. Filed October 3, 1881.

The prisoner was indicted jointly with four others for the murder of Gretchen Kintzler, alleged to have been committed in December, 1877, and on a separate trial was found guilty of murder of the first degree. The case was fairly submitted to the jury in a clear and comprehensive charge, to which no exception was taken. It must be conceded that the testimony before the jury fully justified their verdict. The only ground of complaint is that the court erred in admitting certain items of testimony specified in the assignments of error. Unless

there was manifest error in that regard, there is nothing that would justify a reversal of the judgment after a full and fair trial, such as appears to have been accorded to the prisoner in this case. The evidence of his guilt was direct and positive as well as circumstantial, and it was the special province of the jury to pass upon it and declare by their verdict whether he was guilty or not. If they believed the witnesses for the Commonwealth, and it must now be presumed they did, they could have no reasonable doubt of his guilt.

The testimony complained of in the first assignment was admitted for the purpose of corroborating the statement of Mary Hartley, the principal witness for the Commonwealth, in regard to the piece of crock alleged to have been thrown over into the adjoining woods on the night of the homicide. She had testified, that, immediately after the Kintzlers were murdered and the money divided, one of the parties who actively participated in the felony, scraped some of the blood from the floor into a piece of red earthen crock, and having emptied the same on the ground at the east end of the house, threw the crock over an apple tree into the woods adjoining the premises. It was proved by several witnesses that blood was found next morning where Mary Hartley said it had been emptied, and in further corroboration of her statement, the witness, A. K. Gift, was permitted to testify that he made search at the point indicated by her testimony, and there found several small pieces of crock, which fitted together, and had evidently formed a larger piece, corresponding in kind with that mentioned by her. Throughout the trial, the credibility of Mary Hartley was assailed by the prisoner, on the ground that, according to her own version of the transaction, she was an accomplice in the crime, if any was committed. This was one of the questions which the jury had to consider, and, in view of all the circumstances, we cannot say the testimony was improperly admitted. It tended in some degree to corroborate the testimony of the witness as to the *res geste*. The length of time that elapsed before the search was made would perhaps be a serious objection, if it were not for the explanation, given by the witness himself, that he found the pieces of crock covered by leaf-mould, and overgrown with wire roots, thus indicating that they had probably been thrown there at the time of the murder. The secluded place in which they were found also tended to negative the idea that they were placed there by any other agency than that testified to by Mary Hartley. We agree with the learned judge in

saying that the evidence was very slight, but still, in connection with other facts and circumstances, it was not improper for the consideration of the jury.

The admission of the prisoner, as testified to by J. W. Swartz, were clearly competent evidence. In that interview, he stated, among other things, that he had been invited to go along and help to kill the Kintzlers; that, in reply to Uriah Moyer's invitation to go along, he said: "No, that I can't do, but if you will do it, I will walk away and not say anything about it." This, in connection with his enjoining upon the witness not to say anything about it, was a significant fact. It tended to prove that he was accessory before the fact to the murder; that while, according to his own statement, he declined to take an active part in the commission of the contemplated murder, he encouraged its commission by proposing to walk away and say nothing about it. In the light of other testimony tending to prove motive, as well as actual participation in the murder, it was for the jury to say whether the extraordinary conduct and declarations of the prisoner did not prove him to be one of the guilty parties.

There is no merit in the third assignment. It was not insisted on during the argument, and requires no further notice.

In connection with other evidence in the case, the testimony referred to in the next assignment had some tendency to prove motive, and therefore it was not improperly admitted.

The remaining assignments relate to the admission of testimony offered for the purpose of showing motive, and, in connection with other evidence in the case, of proving the complicity of the prisoner. We fail to discover any error in either of them. The testimony complained of tended to prove facts and circumstances which were proper for the consideration of the jury. The offer covered by the eighth assignment was to prove that the prisoner, in connection with the witness, declared the fire at Kintzlers was not the result of accident, and that he helped to burn them. It requires no argument to prove that the testimony was rightly received as some evidence of guilty participation in the crime laid in the indictment. It might be regarded as slight, but nevertheless it was proper for the consideration of the jury. The ninth assignment relates to the offer to prove that the prisoner knew John Kintzler had a considerable sum of money about his house and where he kept it. The possession of such knowledge by the prisoner may have been but slight evidence of motive, but, in connection with other testimony before the jury, it was proper for

their consideration. The fact that the money belonged to the husband alone is of no practical consequence. If the controlling motive was to obtain possession of the husband's money, and in so doing, both husband and wife were murdered, it cannot be doubted that, on the trial for the murder of either, the motive which led to the commission of the double crime may be shown.

We have considered each assignment in connection with the testimony that was submitted to the jury, and find nothing in the record that calls for a reversal of the judgment.

The judgment is affirmed, and it is ordered that the record be remitted to the Court of Oyer and Terminer of Snyder county for the purpose of execution.

For plaintiff in error, *Messrs. T. J. Smith, A. H. Dill and J. M. Linn.*

For the Commonwealth, *District Attorney H. H. Grim and Messrs. Charles Hower and A. W. Potter.*

NEVLING v. THE COMMONWEALTH.

On the night of February 16, 1880, the prisoner and the deceased had a quarrel, the deceased striking the prisoner with a billy and his fist while on the ground. They afterwards shook hands and separated. The next morning the prisoner armed himself with a gun, and shot the deceased, on the street, in the back, just after he had quietly passed him. Evidence was admitted showing that the prisoner had made threats the night before that he would kill the deceased. *Held*, murder in the first degree.

Intoxication—Insanity.

Error to the Court of Oyer and Terminer of Clearfield county.

Opinion by GREEN, J. Filed October 3, 1881.

The learned counsel for the plaintiff in error candidly admits that his client was guilty of murder, and questions only the propriety of the conviction as to the degree of the crime. As the facts and the degree of the offense have been found by a jury, and there was abundant evidence to warrant the finding, we are precluded from considering the sufficiency of the testimony, and are limited to the precise and specific determination of the matters assigned for error.

The case in all its leading features was one of a very simple character, and quite free of complicated questions. On the night of February 16, 1880, the prisoner and the deceased met at a store in Houtzdale, and, after a few words, went out on the street, apparently to fight. A brief contest took place, in which Pennington, the deceased, struck Nevling, the defendant, with a billy, and also a few blows with his fist, while

Nevling was on the ground. Pennington then desisted from further assaults, and, at the instance of the defendant, they shook hands. But on the same evening, to a number of different persons, Nevling made threats that he would shoot Pennington the next day. The proof of these threats was so conclusive, and came from so many different sources, that there was no attempt to contradict or impeach it in any manner. On the next morning Nevling armed himself with a loaded gun and went out upon the streets of Houtzdale until he met Pennington, who approached from an opposite direction, and passed Nevling in perfect peace and quietness. No words passed between them, nor was there any demonstration of any kind on the part of Pennington toward the prisoner. Almost immediately after passing Pennington, Nevling turned about, lifted his gun, aimed it at the deceased, fired it off, and shot him in the back, inflicting wounds from which he died. After the shooting, the prisoner declared he had done just what he intended to do, and expected to hang for it. One witness, Mr. W. H. Patterson, a member of the bar, who was present immediately after the shooting, testified as follows, to a declaration made by Nevling, in reply to a question put by the witness: "He said, on the night before that Pennington struck him on the head with a billy, and that was the reason that he shot him, and that he well knew that he would hang for it anyhow, and that he didn't care." The uncontradicted testimony disclosed a case in which a previous motive of revenge was shown to exist; threats were made the night before, and repeated the next morning; he shot the deceased, which were followed by a preparation in accordance with the threats, and a deliberate consummation by the actual perpetration of the crime, in circumstances which were entirely devoid of extenuation or even of provocation. In such a condition of things, the ordinary defenses against accusations of murder were quite out of the question. An attempt to set up insanity was made, but it failed entirely for want of testimony. The only serious effort that was made on behalf of the defendant, was an endeavor to reduce the grade of the crime from the first to the second degree. This was based upon an allegation that the prisoner was in a condition of gross intoxication at the time of the offense; that he had long been of intemperate habits, and that his mind was in such a condition that, while he was criminally responsible for his act as an act of murder, yet it was not "fully conscious of its own purposes," and did not deliberate or premeditate in the sense of the act describing murder in the

first degree. It was argued that, at the time of the commission of the offense, the defendant did not possess "the self-determining power which, in a sane mind, renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses." The decision of this court in the case of *Jones v. The Commonwealth*, 25 P. F. Smith, 403, is the basis upon which it was sought to found this defense. An examination of that case, however, shows that the conclusion there reached was based upon the peculiar facts exhibited by the testimony, and was limited to the inferences which naturally arose from them. As the defendant had plead guilty, it became necessary for the court to determine the degree of the offense, and this was done upon a consideration of all the facts of the case. The controlling facts are thus indicated in the opinion delivered by Chief Justice AGNEW: "William S. Jones had been upon bad terms with his wife; she had become too intimate with another Jones called Charley; William S. Jones, failing to break off the association, got to drinking hard, and, finally, after another quarrel with his wife on the 10th of June, 1871, attempted suicide by taking a large quantity of laudanum. Dr. Davis found him lying on a lounge, partly insensible, eyes nearly closed, pupils contracted, and face discolored by congestion. Energetic remedies were used, and he was so far restored as to be out of danger, but the effects of the laudanum remained. From this time until the night of the 19th of June, when he took the life of Mrs. Hughes, his mother-in-law, he was in a constant state of nervous excitement, continued drinking, and had bottles of laudanum about his person. Many witnesses describe him as without sense, constantly talking nonsense, wild in appearance, and incoherent in speech. Some say he acted like a man drinking hard, was intoxicated, and once fell from a horse. Others described him as looking crazy, talking to himself, his hands going, his head thrown back, walking to and fro, throwing his head about, swinging his arms, and wild, nervous and excited. He would jump upon a chair and begin to preach, and run off upon Charley Jones and his wife; said he was going to build a tavern on the mountain and a church beside it; claimed all the property about, and was evidently much out of the way. These appearances were particularly noticed on the 19th day of June, the day of the homicide." The foregoing facts, together with the consideration that Jones had been on pleasant terms with his mother-in-law, had made no threats against her, and had shot her under a sudden impulse, after she had raised a stool, telling him

she would level him with it if he did not leave, induced this court to believe that it was "a matter of grave doubt whether his frame of mind was such that he was capable of deliberation or premeditation." The facts in the foregoing case were so radically dissimilar to those of the case under consideration that they constitute no precedent to be now followed. The principles stated in the opinion, which were supposed to be applicable, were presented to the court below, on the trial of Nevling, in the form of points, and the answers to these, and certain language in the general charge, constitute the subjects of the principal assignments of error. We proceed to refer to them in their order. The first assignment complains of a portion of the charge relating to the character of the doubt requisite to justify an acquittal. We see no error even in the selected sentences, which are claimed to be erroneous. When taken in connection with the other comments of the judge on the same subject, not embraced in the specification, it is quite plain that the charge is not obnoxious to the criticism made upon it. The learned judge, in immediate precedence to and in direct connection with the language complained of, had defined with great care and perfect legal accuracy the duty of the Commonwealth to establish the prisoner's guilt, "by clear and satisfactory evidence beyond a reasonable doubt;" that "the Commonwealth in all cases must prove everything that is necessary to constitute the crime, prove it fully and clearly to the satisfaction of the jury beyond a reasonable doubt. If the Commonwealth fails to make out any of the necessary parts of the crime, the result of it is, that the jury must acquit the defendant; or if the evidence, after it is all heard by the jury, leaves the question of the guilt of the prisoner in doubt, so that it is difficult to determine whether he is guilty or not, the doubt must work the acquittal of the defendant." The learned judge then proceeded to say that the doubt must be a reasonable one, and that jurymen could not doubt as jurymen what they believed as men. In all this there was no error. It is the familiar language found in the text books and decisions which treat of the subject. The whole language of the judge must be taken together, and we fail entirely to perceive any tendency to mislead the jury or to lower the grade of proof required to convict.

There was certainly no error in the language complained of in the second assignment. It was a mere general description of the mental capacity which subjects individuals to responsibility for their criminal acts, and of the incapacity which relieves them of that responsibility.

ity. It is not alleged that there was any positive error in this portion of the charge, but rather argued that there was error by implication in leading the jury to suppose that there were but two classes of men, either those wholly sound, and therefore responsible, or wholly unsound, and therefore entirely irresponsible. We see no such meaning in the language of the judge, and we think what was said was quite pertinent to the case.

There is no merit in the third assignment, and it is not really pressed. As to the fourth assignment, the learned counsel for the plaintiff in error admits that there was no error in what was said by the judge. It was indeed a most favorable presentment of the defendant's theory. But it is said, as before, that the jury were not herein instructed as to the difference in the grades of the offense. Granting this, it proves nothing as to the erroneous character of this portion of the charge. The judge was not bound to be constantly presenting that one view of the case. It was not an answer to a point, but a part of the general charge, and was strictly correct.

The subject-matter of the fifth assignment is the statement by the court in an isolated sentence as to what the question was, which was in dispute. The court stated it to be, "whether the defendant was in such a condition as to be capable to form a design to kill, and did kill in pursuance of that design." This was said at the end of an extended presentation of that part of the case which related to the condition of the defendant at the time of making the threats, and at the time of the shooting. After referring to the testimony as to the intoxication of the defendant, the court said to the jury: "It becomes an important question in the case for you to determine whether or not he was in a condition to know and understand what he was saying and doing when he made these threats." This was followed by the statement that if the defendant was so drunk as to be unconscious of the meaning of the threats, they were of no account, but if he knew and understood their meaning, and if he carried them into execution, this would be evidence of deliberation and premeditation. After much further comment on this branch of the case, and with ample reference to the testimony, the judge further said: "All of this is proper evidence for you to consider in determining whether he was in such a condition as to know what he had done, and whether he knew the consequences of his act. If he was in such a condition as to know what he was doing, and knew the consequences of his act, and did it in pursuance of a previously

formed determination, then the law says he is guilty of murder in the first degree, but if he did the act without deliberation and premeditation, then he would be guilty of murder in the second degree." Immediately following this is the language complained of in the fifth assignment. It seems to us to be a substantial statement of the essence of the controversy. What positions may have been taken in the oral argument, of course, we cannot tell. We can only deal with the record as we find it. There is certainly no error anything the court said in presenting this part of the case. Whether there was any error of omission we cannot know except by the points and the answers to them. We fail to see anything in the facts of this case, as developed by the testimony, to call for any more refined distinctions as to the defendant's mental condition than those which were contained in the charge and answers. The jury were instructed to find a verdict of murder in the second degree, if they found the killing was done without deliberation or premeditation, and that was as favorable a presentment of that aspect of the case as the defendant could ask.

There was clearly no error in the sixth assignment. Everything in the defendant's second point was affirmed. The added remarks of the judge were entirely correct in every legal sense, and were but a reasonable precaution to be given to the jury in connection with the matter contained in the point. The defendant did not ask in the point for a distinction between the two degrees of murder, and therefore there was no error in not giving it. He only asked for an instruction that if the hypothesis of the point were true, he would not necessarily be guilty of murder in the first degree, and that was affirmed. The alternative of the point was also stated by the court, and stated correctly.

As to the seventh assignment, it must be admitted that the answer of the court to the defendant's third point was obscure. But obscurity is not necessarily error. The only facts stated in the point are those which are essential to conviction, and if these are the facts to which the court referred in the answer, there was not only no error in the answer, but it was a more emphatic expression in favor of the defendant than the point itself. This, indeed, is the literal interpretation of the words of the answer. If, however, the judge referred to the implied facts—implied from the negative form of the point, to wit, that the jury must acquit or convict of something less than murder in the first degree, if they should find that the defendant did not possess the self-determining power which, in a sane mind, renders it conscious

of the real nature of its own purposes, and capable of resisting wrong impulses;" then, also, the answer was correct in a legal sense, and the qualification, while it was unnecessary, did no harm. In either aspect there was no error in the answer.

As to the eighth assignment, it is only necessary to say, that the defendant's fourth point was affirmed, and that the qualification added is in exact conformity with the distinction stated by Chief Justice AGNEW, in the case of *Jones v. Commonwealth*. In fact the fourth point is a literal copy of one sentence in Judge AGNEW's opinion, and the qualification is a substantial copy of the next sentence. The learned judge of the court below simply followed the example of the Chief Justice in presenting the qualification in immediate connection with the doctrine. Of course there was nothing erroneous in what was said, nor anything tending to mislead.

Ninth assignment. In no point of view was it competent to give in evidence the declaration of Pennington to Glasgow, on the 14th of February. It was no part of the *res geste*; it was not alleged that the declaration was ever communicated to Nevling, and it was altogether inapt to a defense of mental incapacity. Had there been any evidence of an affray at the time of the shooting, and had the threat, such as it was, been communicated to Nevling, it might have been admissible, though of but little real weight in the case. But in the actual circumstances of this case, it was totally irrelevant, and could have subserved no proper purpose in the trial of this cause.

Tenth, eleventh and twelfth assignments. The question to Weible was asked to show the actual condition of Nevling just before the shooting. The witness had detailed the circumstances of the conduct and language of the prisoner at his store, and had given his opportunities for knowing the mental condition of the defendant at that time. The fact of impaired mental condition of the prisoner, amounting to unconsciousness of his purposes at the time of the shooting was put in issue as a defense, and it was clearly competent to show by the witness, after proving the pertinent facts which occurred in his presence and hearing, whether such unconsciousness then existed. This is matter of every-day practice in issues touching the sanity or capacity of persons. The opinion is competent if preceded by proof of actual facts, affording opportunities of observation and inference. But the questions to Mr. and Mrs. Scott were entirely different in their character. They did not relate to the prisoner's actual condition at

the time of, or immediately before or after the offense, they were purely hypothetical, and they assumed as their basis a state of facts which was altogether disputed. Whether the prisoner was sane or insane when intoxicated was a mere general question, a pure matter of opinion, and the answer to it could not prove anything as to his actual mental condition at the time of this occurrence. Both the witnesses were permitted to, and did, testify to any facts within their knowledge as to the conduct and declarations of Nevling when he was intoxicated. Both of them said they did not see him on the day of the shooting, and of course they did not know whether he was then intoxicated or not. The offer to prove their opinions in such circumstances was clearly inadmissible.

The thirteenth assignment alleges a general tendency to mislead the jury in the charge. We have read the charge very carefully, and also the testimony delivered on the trial, and we are unable to observe any such tendency. On the contrary, it seems to us to be a very correct, fair and impartial presentment of the law and the facts of the case. The chief complaint of the defendant under this assignment is, that the court did not adequately present and explain to the jury the subject of a conviction of murder in the second degree. It is but fair to the court to say that none of the defendant's points exhibited that question as an alternative, so as to require any special illustration of it. In some of the points it is claimed there could not be a conviction of murder in the first degree; but the alternative of a conviction in the second degree was not suggested, and, therefore, so far as the points are concerned, it does not appear that the distinction now contended for so earnestly was presented to the attention of the court. What may have been said in the oral argument, of course we do not know. So long as there was a chance of acquittal, it may not have been good policy to put in the point the suggestion of a conviction in the second degree as the alternative for a non-conviction in the first degree, but the court below could not be responsible for such omission. The points were properly answered, and the general charge was a correct and fair presentation of the whole case, and hence we cannot reverse.

Judgment affirmed, and it is ordered that the record be remitted to the Court of Oyer and Terminer of Clearfield county for the purpose of execution.

For plaintiff in error, *Messrs. J. B. McEnally and S. V. Wilson.*

For the Commonwealth, *District Attorney J. F. McKendrick and Wm. M. McCullough, Esq.*

McMILLEN'S APPEAL.

A testamentary provision for the education of testator's nephew for the ministry, made within one calendar month of the death of the testator, is not a gift for religious use, and is not void under the Act of April 26, 1856.

Appeal of James D. McMillen, Trustee for John Edgar, from the decree of the Orphans' Court of Philadelphia county.

Sarah McPherson died November 23, 1880, having left a will dated November 13, 1880, by which she devised and bequeathed the residue of her estate to the appellant, as trustee, to invest the same until January 1, 1887, after which time to apply the income and principal, if necessary, for the maintenance and education of her grandnephew, John Edgar, for the Presbyterian ministry, until he shall have acquired a thorough education and have been ordained a Presbyterian minister of the gospel, and upon his ordination the whole balance to go to the said John Edgar absolutely. But if he should refuse to accept the proffer to qualify himself for the ministry, or at any time, previous to his ordination, refuse to continue his studies and qualify himself for said ministry, then the balance in the hands of the trustee at the time of such refusal, the testatrix devised and bequeathed to Princeton College, to be appropriated to the education of Presbyterian ministers.

For appellant, *Messrs. Joseph Parish and William C. Hannis.*

Contra, Geo. Tucker Bispham, Esq.

Opinion by GORDON, J. Filed April 10, 1882.

We cannot agree with the learned judges of the court below that the trust created by the will of Sarah McPherson, for the benefit of her nephew, John Edgar, was either a charitable or religious use within the meaning of the Act of 1855. The main object of her bequest was the education of her young relative, and his settlement in life in an honorable profession. The mistake seems to have originated in the idea that because the prescribed education and profession were religious, therefore the trust was religious within the meaning of the act; but it was nothing of the kind. It is conceded that the bequest to Princeton College, though a secular institution, is void as a charitable use, yet, I suppose, no one would entertain the idea that if the trust were to educate John Edgar in that or any other college, the residue to be paid to him when he graduated, that it would be void under the statute. So, carrying the example a step farther, if the donation were for his education, the remainder to be paid to him

when he had received the degree of doctor of medicine from a medical college, no one, we think, would contend that this was a charitable use, and yet a devise to a medical college would be such a use. The object of the trust was neither charitable nor religious within the technical meaning of those terms, but the carrying out the intention of the testatrix in the education of her nephew, and in conferring upon him the means of future support, the church might or might not be benefitted by having John Edgar for one of its ministers, for he was not required by the will to act in the ministerial office after ordination; but I cannot see that the case would have been altered had he been required to preach for fifty years after such ordination, any more than had the requisition been that he should learn the trade of a carpenter and follow it for a livelihood. The primary object of the donor was to benefit, not the church or the world, but her nephew, and it certainly would be regarded as a strange thing to announce that the statute in any degree limited the power of a parent, uncle or aunt, to direct by will the education of a child or other relative. The case is not at all like that of *Rhymer's Appeal*, 12 Norris, 142, for there the gift was directly to the church and for strictly religious purposes.

Had the gift in this case been to a synod, presbytery or seminary, under condition that part of it should be used in the education of John Edgar for the ministry, or for any other purpose, it would, no doubt, be within the case cited; for we apprehend, if the gift be directly to a charity, a direction to use it in a particular way, or for a particular person, would not relieve it from the ban of the statute.

On the other hand, where the gift is for the immediate use of a particular person or persons, the case is not brought within the act by the fact that a charity may incidentally be benefitted thereby.

The decree of the Orphans' Court is now reversed and set aside at the costs of the appellants, and it is ordered that the balance now in the hands of the appellant be and remain in his possession as trustee of John Edgar.

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH ex rel. MARY E. REED v.
SHERIFF OF PHILADELPHIA.

Where on an appeal from the judgment of a magistrate, a judgment in the Common Pleas is entered for want of an affidavit of defense, the record by itself is not sufficient evidence to hold the defendant for perjury

in swearing "that if the proceedings appealed from are not removed, she would be required to pay more money than is justly due," as required by the Act of March 27, 1865.

Habeas corpus.

In June, 1881, Mary E. Reed, the relator, contracted a bill for paper-hanging to the amount of \$30, with one Trout, and afterwards admitted its correctness to one of Trout's employees. In the August following Trout sued her before a magistrate and obtained judgment for debt, interest and costs, execution being superseded by an appeal taken September 12th.

The relator made an affidavit under the Act of March 27, 1865, *Purd. Dig.*, Vol. I, 862, that the appeal was not taken for delay, but if the proceedings appealed from were not removed she would be required to pay more money than is justly due.

The appeal was filed October 6, 1881, and subsequently judgment was taken for want of an affidavit of defense, execution issued and writ returned *nulla bona*.

The relator was then arrested and charged with perjury, in making the affidavit of appeal, and bound over for her appearance at court to answer.

At the hearing under this writ, Trout and his employee both testified to the acknowledgment of the debt and promise to pay by the relator, and that the amount was justly due, and it was admitted that she made the said affidavit before a qualified officer, etc. The records of the magistrate and Common Pleas were also in evidence. It was alleged on the part of the Commonwealth that so much of the affidavit as stated, "she would be required to pay more money than is justly due," was false.

For relator, *James H. Heverin, Esq.*

The evidence is not sufficient to sustain an indictment for perjury.

For the Commonwealth, *District Attorney George S. Graham and John H. Sloan, Esq.*

The oath was material, as it deprived the plaintiff of a substantial right to proceed at once, without the delay and expense of an appeal. The affidavit of appeal was false, wilful and corrupt. There is no pretense of any defense shown by the testimony. Thus all the elements of perjury are made up: *Commonwealth v. Kuntz*, 2 Clark, 375. A rash and presumptuous oath to a material fact is perjury: *Commonwealth v. Cornish*, 6 Binn., 249.

Two witnesses testify that the amount was justly due. This testimony, together with the corroborating proofs of the records of the magistrate and Court of Common Pleas, is sufficient,

and meets the requirements of the law in supporting an indictment for perjury.

Opinion by ELCOCK, J. Filed December 30, 1881.

Perjury is the swearing falsely, wilfully and corruptly before a competent officer to some material fact in a judicial proceeding, or such as are named in the statute.

The falsity of the oath must be proved by more than a single witness; and this is not a technical rule, but one founded on substantial justice. It is the chief point in this case. What proves that the allegation here was false? Does the mere fact that she abandoned her case, or neglected to file an affidavit of defense, amount to proof that she would *not* be compelled to pay more money than was justly due? The judgment of the court on the appeal was simply that plaintiff recover the judgment upon his own showing. She was not heard, and whether that amount was justly due is not determined except on a hearing of both sides where justice determines the merits of each. An *ex parte* judgment is only a determination on the *prima facies* of the case by submission, and the record shows no more. If on the appeal she had a hearing, and showed no reasonable ground or probable cause for her belief in her statement, the charge might lie, and even then the probable cause is to be determined from the defendant's standpoint.

But where is there any fact in this case going to show the falsity of the statement that she would be required to pay more than was justly due if the proceedings were not removed. The record by itself does not show it, and there is no other proof. She was not to prosecute her appeal with effect, nor make good her defense on her appeal. Nor was there evidence to show any corrupt motive, or that she defeated or delayed an execution to the injury of the plaintiff, or of a declaration of an intention to defraud. There is no corruption in asserting a right given by law, or in failing to make good a defense which may be believed to be good and true.

These affidavits are required upon appeals to prevent unnecessary litigation, expense and delay, where no merits exist in a defense, but they are not to be made engines for criminal prosecutions which would require a defendant to establish an effective defense, or be punished as a criminal.

There not being sufficient proof of the falsity of the statement or of a corrupt motive in making the affidavit, the case falls, and the relator is discharged.

— *Weekly Notes of Cases.*

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PITTSBURGH, PA., JULY 26, 1882.

Supreme Court, Penn'a.

HAINES, MISKEY AND CLEMENT v. THE COMMONWEALTH.

The right to a bill of exceptions in criminal cases depends entirely upon Acts of Assembly.

The courts may by rules fix the time within which such bills shall be presented and sealed; and the judge need not seal the same unless presented in conformity with those rules.

The district attorney has no power to waive these rules. In a proceeding by mandamus to compel a judge to seal a bill of exceptions, there can be no traverse of the respondent's return.

Error to the Court of Quarter Sessions of Philadelphia county.

This was a proceeding by mandamus to compel the Judge of a Court of Quarter Sessions to seal a bill of exceptions, to which the following return was filed:

To the Honorable the Judges of the Supreme Court for the Eastern District of Pennsylvania:

The answer and return of THOMAS K. FINLETTER to the writ directed to him by the said court on the 9th day of January, 1882.

This respondent, by protestation, not owning or allowing any of the matters of the petition presented by the plaintiffs in error to be true as they are therein alleged, but waiving, so far as it is in his power so to do, all and every objection to the jurisdiction of your Honors in respect to the prayer of the petition, shows and offers to the consideration of your Honors as follows:

A proper understanding of the facts alleged in the petition will be more clearly had by considering them in the order of their occurrence.

The verdict was rendered on the ninth day of February, 1881. Within ten days thereafter a bill of exceptions was presented and indorsed with my signature. I did not then, nor at any other time say, in reference to this bill of exceptions, or any matter connected with the case, that "I did not hold parties to a question of time, or anything from which that might be inferred.

On the day of April one of the counsel for the defendants requested me to fix a time for settling the bill of exceptions. I replied: "Is

it not too late? I think the rule of court requires the bill to be presented for settlement within thirty days." I however said, I will be in court on Wednesday at 10 o'clock to hear any application you may have to make.

At the time fixed I was in court and waited more than half an hour. The district attorney attended, and two of the defendants' counsel were in court, but no application was made.

Subsequently, at the request of the counsel for defendants, I fixed several times for hearing them in reference to this matter, but no application was made to me until the 4th day of May, when the bill of exceptions was presented.

Upon examination I considered it to be my duty not to seal it, and gave my reasons in writing, one of which is as follows:

"In addition, the bill of exceptions was not presented to me for settlement within the time prescribed by the rules of court.

"There may be such explanations of this delay as will satisfy me that I ought not to let it prevent me from signing a proper bill."

After this I fixed several times, perhaps twelve or fifteen, for meeting the defendants' counsel. At all of these times I was present but no application was made until the 23d day of November, when defendants' counsel presented a bundle of papers which had not my indorsed signature.

In presenting these papers he said in substance: "When a bill of exceptions was presented to you some time since, your Honor very properly refused to seal it, for the reasons which you then gave."

That there might be no misunderstanding I wrote upon the papers my refusal and returned them to counsel. He then said there was no rule of court, and if there was he desired me to seal the bill as a matter of grace. I replied that both of these questions were embraced in my refusal as indorsed upon the bill, but I was willing to hear any application he should think proper to make.

At no time has any of the counsel for the defendants, or the defendants themselves, asked me to consider the bill of exceptions for settlement *nunc pro tunc*. Nor have they, nor has either of them, given me any reason or excuse or explanation for disregarding the rule of court.

I never had any knowledge of the correspondence between the district attorney and defendants' counsel until informed by the petition.

On page 15 of the printed petition, the petitioners "call the especial attention of your Honors to the following matters above recited: 1. That the judge and district attorney frequently assured petitioners' counsel that no

question could be raised as to time, in face of which the final refusal to seal the papers is rested upon an untrue allegation of delay."

I do not know what the district attorney may have "assured petitioners' counsel," but I have never in any way given any assurance, nor said, nor done anything whereby the counsel of the petitioners, or any one else, had a right to infer "that no question could be raised as to time."

It is not true as averred in the petition, "yet when engrossed a new and entirely different objection was stated, to wit, that they were presented too late." This objection was distinctly raised when the first bill of exceptions was presented.

It is not true as averred, "That the final refusal is placed exclusively upon the allegation that the application is not made within the time prescribed by the rules of court."

The reason indorsed upon the bill itself is as follows: "It is manifest that this application is not made within the time prescribed by the rules of the court. No reason or excuse for this disregarded of the rules of court has been assigned, I therefore decline to examine or seal these papers as a bill of exceptions."

Whether or not "the petitioners are informed that there are no rules of court applicable to this case," I do not know. I aver, however, that such rules exist, and have existed since December 28, 1874, and that they are correctly quoted in my refusal to seal the last bill. I desire the following certificate to be considered as in part my answer.

"At a meeting of the Judges of the Courts of Common Pleas and Quarter Sessions of the County of Philadelphia, held on the 28th day of December, 1874, it was among other matters resolved,

"That the rules of the District Court upon the subject of bills of exceptions be adopted as the rules of the Courts of Oyer and Terminer and Quarter Sessions.

"The foregoing is certified from the original minutes of the Board of Judges.

"Signed, JAMES T. MITCHELL,
"Secretary."

The counsel of petitioners had notice of these rules before the petition was presented. They could have verified or disproved their existence by producing to your Honors the printed and bound rules of the court in which this case was tried.

I distinctly deny that I sent an incomplete record to this honorable court, and aver that the return made by his Honor Judge LUDLOW and myself, to the writ of error, was a full and complete return of all matters contained of record when said return was signed by us.

I deny "that the filing of said bills of exceptions, and of points of charge and of the an-

swers thereto, were duly entered by the clerk upon the minutes and indorsed on said papers." I aver that said papers were improperly filed; and that the entries upon the minutes, and the indorsements upon the papers were made improperly, and without the consent or knowledge of the judge who was then holding court, and without my knowledge or consent.

I have never seen the minutes, and I never saw the writ of error or the record until the writ and the return thereto, signed by Judge LUDLOW, was sent to me by the district attorney for my signature. I returned them to him with a message that I did not think I had a right to sign the return as I was not holding that court.

On December 3, during Judge LUDLOW's term in the Quarter Sessions, the district attorney brought me the writ of error and return, and informed me that Judge LUDLOW had said that it was proper for me to sign the return as I had tried the case. I then signed it, and gave it to him, and I have had nothing to do with it since.

Before the rule to amend the record was granted, the district attorney and the deputy clerk of the court called my attention to the fact that the two bills of exception and the points of charge, and the request to file my notes of the trial and charge, had been presented to the clerk and marked "filed;" and that a note thereof, and of my indorsement upon one of the bills of exception, had been entered upon the minutes at the request of defendants' counsel.

Subsequently the clerk of the court informed me that the entries on the minutes had been inadvertently made by his deputy, because he thought the indorsement made by me on one of the bills was an order to enter the same upon the minutes, and inquired of me what he should do with them. In accordance with my judicial duty I gave him the following order:

"There was no Court of Quarter Sessions held by me November 23, 1881, in the matter of the *Commonwealth v. Miskey et al.* No clerk of the court was in any way present or authorized to make any minutes of any proceedings in the said court; and, furthermore, the writ of error in the case of the *Commonwealth v. Miskey* was served on the 22d day of November, 1881.

"The clerk of the court is therefore ordered to strike from the minutes any entry he may have made of any proceeding in the Court of Quarter Sessions on the 23d day of November, 1881, purporting to have been made by me."

Afterwards the clerk informed me that the counsel for the defendants had refuse to take back the bills of exceptions when he had tendered them; and that they had demanded a certified copy of the minutes which I had or-

dered to be stricken off; that he had refused to give it; and that then they wrote to him threatening to sue him and his sureties if he did not furnish the certified copy; and he desired me to protect him in the matter, whereupon I gave him the paper marked exhibit C in the petition.

It may not be improper for me to state the reasons which influenced my action.

I believed that when I was called upon to sign the return to the writ of error no one had a right to add to, or alter, or amend the record in any particular. That it was our duty to return the record as it was; that if the return was in any particular deficient or incorrect, it became the duty of the petitioners to apply to your Honors for proper relief; that the counsel for the petitioners had no right to file the papers without the permission of the judge then holding the court, or without my permission; that the clerk had no authority to make the entries upon the minutes, or the entries upon the papers; and that it was but another way to get before your Honors the bill of exceptions which I had refused to settle or seal.

I furthermore believed that no judge of the Court of Quarter Sessions ought to exercise a right to amend the record of a case tried before another judge; that if a judge who could know nothing about the case could amend the record upon the application of a defendant, he might do so upon the application of the district attorney, and thus not only would the rights of the Commonwealth be sacrificed but the liberty or life of the citizen be jeopardized.

Again, it is evident that in all such applications the judge who undertakes to amend a record must sit in judgment, not only upon the judicial conduct and veracity of the judge who tried the case, but also, perhaps, upon entirely new matter, and thus the case would be re-tried and a righteous judgment might be annulled; for he must determine the matter before him upon the evidence. Convictions would then become fruitful in perjuries, and the administration of the criminal law a farce. To illustrate this, in the petition for the rule to amend it was averred by the defendants that I had refused to poll the jury when requested to do so by the counsel for the defendants, and his Honor was requested to amend the record by placing upon it that which had never taken place.

I further suggest to your Honors, not as bearing upon the legal aspect of the case, for that is exclusively your Honors' province, but as indicating their sense of propriety, that all the judges of this judicial district have repeatedly, when assembled as a Board of Judges, asserted

and assented to the proposition many times made therein, that the Judge holding a Court of Quarter Sessions had exclusive control of all matters tried before him, and that no other judge ought to take cognizance thereof.

To prevent an unseemly difference of action of the several Courts of Common Pleas the Board of Judges have made a rule that, whenever any one of the courts has charge of any matter, it shall have exclusive control of all matters in any way arising therefrom or pertaining thereto.

A conflict between the judges holding the several sessions of the Court of Oyer and Terminer and Quarter Sessions would be more unseemly and much more disastrous in its consequences to the rights of the Commonwealth and to the rights of its citizens.

I respectfully suggest that no evil can arise from establishing that the judge who tries the case shall have exclusive care and control of it whilst in the Quarter Sessions or Oyer and Terminer.

If he refuses to perform any duty which the law and the facts of the case require, an appeal lies to your Honors, and the law is then certainly determined. He is not tried and condemned by your Honors, but is instructed by those only who have the right to direct him in his judicial duty.

It is important to keep the administration of the criminal law orderly, and the judiciary free from reproach, and especially to prevent your Honors from being imposed upon either from design or carelessness, or through the ignorance of defendants, or the inadvertence of the clerk of the court.

It is true that when petitioners' counsel stated their exceptions I noted the same, and that I have now in my possession my notes of the trial in which the exceptions are noted. But if the petitioners mean bills of exceptions, signed at the time of the trial, I have not any such in my possession—for there never were any. If they mean the bills of exception subsequently prepared by counsel, I have them not in my possession, and never had anything to do with them, except as hereinbefore stated. Nor have I ever had any other paper or papers in reference to said exceptions.

I have not filed my notes of the trial because I did not and do not believe that petitioners had or have a right to require me to do so, and that I had no right to encumber the record by filing them.

If, however, your Honors should be of opinion that I ought to have complied with the request to file my notes, I have them ready to present as a part of my answer.

The exceptions numbered in the petition 1, 2, 7, 8, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31, were not taken, and are not truly stated in the petition.

The exceptions numbered in the petition 3, 4, 6, 7, 12, if taken, were not noted by me; and I have no recollection, information or belief that any of these exceptions were taken.

The exceptions numbered 5, 9, 13, are correctly stated. There is no exception No. 11.

The bill of exceptions appended to the petition presented to your Honors is not a true copy of the last bill of exceptions presented to me for settlement and sealing.

That portion of it from the word "attorneys" in the eleventh line, p. 21, to the sixth line from the bottom; and also from the word "question" to "except," both inclusive, in p. 23; and also "objected to by defendants that the answer, whatever it might be, would be irrelevant, as the security was fixed by law;" and also from "Commonwealth closed" to "defense opens;" and also from the sixth to the nineteenth line, p. 31, are not in the last bill presented to me for settlement.

In the last bill presented to me for settlement, p. 19, the following occurs: "Q.—What knowledge have you of the fact that Pooley & Young did the work the year before and what they did it for then? Objection sustained. (Court.) You can show what they did or said in reference to this work. Ex. to defendants." This is not in the bill presented by petitioners to your Honors.

Having presented to the court my entire judicial action in this case, with the rules which bound me in default of any application for their relaxation, I should regret if, by the neglect of any one, the parties would be deprived of the opportunity of having the case re-examined by the highest court.

I am therefore willing and now hereby offer, notwithstanding the lapse of time, to affix my seal to a bill of exceptions, which shall set forth truly the exceptions taken and allowed by me on the trial, as they are hereinbefore in this answer confessed and set forth; but I am not willing, and hereby refuse, and shall continue to refuse, to affix my seal to either of the bills of exceptions heretofore tendered to me for signature by the counsel for the petitioners, unless I am instructed by your Honors that it is my duty to do so, because I deny that they truly represent that which occurred at the trial.

THOMAS K. FINLETTER.

For writ, *Messrs. Hon. F. Carroll Brewster, Lewis C. Cassidy and James H. Heverin.*

For respondent, *Hon. Wm. A. Porter and Hon. Henry M. Phillips.*

Opinion by SHARSWOOD, C. J. Filed February 6, 1882.

A writ has been issued in this case in accordance with the provisions of the Statute of Westminster, Edw. I, c. 31, (Roberts' Dig. 92), to THOMAS K. FINLETTER, one of the Judges of the Court of Quarter Sessions of Philadelphia county, founded upon the complaint of the plaintiffs in error that, on the trial before him, various exceptions were taken and alleged to certain of his rulings and to his charge, and that he had refused to affix his seal to those exceptions, commanding him to affix his seal thereto. To this writ Judge FINLETTER has filed an answer.

It is beyond all question that the Statute of Westminster was never held to apply to proceedings in criminal courts. In *Middleton v. The Commonwealth*, 2 Watts, 285, it was decided by this court that where the judge had actually sealed the bill, it would not be considered. GIBSON, C. J., said: "It is not pretended that the judges were bound to seal these bills of exceptions; but it is said that, as they have voluntarily done so, we are bound to inspect the matter supposed to be thus put on the record. But the statute sanctions nothing which it does not enjoin; and as it has been held in *Sir Harry Vane's case*, according to the report of it in 1 Levinz, 68, and Kelyng 15, to be inapplicable to any criminal matter whatever, the case before us stands precisely as it would have stood before the statute." The same thing was decided in *Schoeppe v. Commonwealth*, 15 P. F. Smith, 51. At common law no bills of exceptions were permitted in criminal cases, nor did the evidence, rulings and charge of the court form any part of the record. It is clear then that the right to a bill of exceptions depends entirely upon the Acts of Assembly. The Legislature, on the 6th day of November, 1856 (P. L. 1857, Appendix, 795), passed "An Act allowing Bills of Exceptions and Writs of Error in Criminal Cases." The provisions of this act were incorporated with the Criminal Procedure Act of March 31, 1860, P. L. 411. As, however, they are confined to trials on any indictment for murder or voluntary manslaughter, they are inapplicable to the case now before us. They provide that the defendant "may except to any decision of the court upon any point of evidence or law, which exception shall be noted by the court and filed of record as in civil cases:" Sec. 57. And also that the court may be required to give an opinion upon any point submitted and stated in writing, which point and answer shall be filed with the records of the case. On the 19th of May, 1874, was passed the Act, entitled "An Act to provide for review in the Supreme Court

in Criminal Cases:" P. L. 219. After providing "that on the trial of all cases of felonious homicides, and in all such other criminal cases as are exclusively triable and punishable in the Court of Oyer and Terminer and general jail delivery, exception to any decision of the court may be made by the defendant, and a bill thereof shall be sealed in the same manner as is provided and practiced in civil cases," and "in all other criminal cases exceptions as aforesaid may be taken." This is all the legislation on the subject, and it is clear that a marked difference is made between homicide cases and voluntary manslaughter and other cases. In the former, the court is bound to file of record the rulings upon points of evidence or law, and also its answer to points submitted. In all other criminal trials exceptions may be taken as in civil cases. This may be considered as extending the Statute of Westminster to this class of proceedings. The court is not bound to file the charge in writing, or the answers to points or the rulings, on questions of evidence. In all these matters the defendant is remitted to his bills of exceptions. In strictness these ought to be presented and sealed during the trial, and such was formerly the practice in civil cases. The courts, however, have relaxed this strictness, and all that is required now is that the exceptions should be taken and noted at the time: *Stewart v. Huntingdon Bank*, 11 S. & R., 267. There is nothing in any Act of Assembly to prevent the courts from returning to the old strictness under the Statute of Westminster. But it is very plain that this new practice required to be regulated by rules of court, and a reasonable time fixed within which the court should be called on to seal the bill. It ought to be within such time as that the matter may be still fresh in the recollection of the court. Accordingly the civil courts have generally adopted rules to the effect that the bill should be presented to the court within a certain period, and finally settled and sealed within a defined time thereafter. There is no reason why criminal courts should not adopt the same rules. Indeed, it may well be doubted whether under the general and comprehensive terms of the Act of 1874, these rules in civil cases would not be applicable. However, it is unnecessary to decide that question here, as it appears by the answer of the respondent, with a copy of the record, that they have been expressly adopted by the Judges of the Courts of Oyer and Terminer and Quarter Sessions of Philadelphia county. They ought certainly to be enforced. It is a mistake to suppose that they can be waived by the district attorney for the Commonwealth. They are intended for

the protection of the judge as well as for the Commonwealth. The idea put forth in the oral argument, that when the parties have agreed to a bill of exceptions, the court is bound to seal it, is certainly something new under the sun. The answer shows clearly that, whatever the district attorney may have done, the respondent never waived his right to insist upon the enforcement of the rule. When he was first requested to fix a time for sealing the bill, which was long after the time prescribed by the rule had expired, he raised the objection, but fixed a subsequent time to hear the application. At the time fixed he was in court, as also the district attorney and two of the defendants' counsel. But no application was made. Other times were appointed, but the bill was not presented until several weeks after, when he refused distinctly, on the ground that it was not presented for settlement in time, and gave his reasons in writing, but added, "there may be such explanations of this delay as will satisfy me that I ought not to let it prevent me from signing a proper bill." He afterwards fixed several times; but no application was made until November 23, nine months after the trial, when a paper was presented to be settled which had not indorsed any note by him to show that it ever had been presented. He very properly then refused to seal the bill. A bill of exceptions must be settled within the specified time, or it will be disregarded: *Kirkpatrick v. Lox*, 13 Wright, 122.

Nothing further need be added. There can be no traverse of the respondent's return: *Conrad v. Schlass*, 5 P. F. Smith, 29. If there exists any reasons why this rule should not apply in criminal cases, it is for the Legislature to annul it and provide a remedy. It is very evident that we have no power to order the respondent to file his charge, or his answer to the points or his notes of testimony.

It is ordered that the respondent go without day.

HILL v. THE COMMONWEALTH.

The malicious setting fire to a barn belonging to a dwelling house, so situated that its destruction by fire would endanger the dwelling house, constitutes felonious arson under the 137th Section of the Penal Code, P. L. 1860, 415, although the barn was not adjoining nor parcel of the dwelling house, and the latter was not in fact burned.

Error to the Court of Oyer and Terminer of Lycoming county.

Charles Hill was indicted and tried for felonious arson. The indictment contained three counts. The first charged him with feloniously, maliciously and voluntarily burning a barn belonging to the dwelling house; the sec-

ond count with feloniously, maliciously and voluntarily burning a barn, *parcel* of a dwelling house; the third count with feloniously, wilfully and maliciously burning a barn containing hay and grain.

The testimony was not printed. Defendant's counsel presented the following point: "If the jury believe from the evidence that the barn mentioned in the indictment was located at some distance from the dwelling house, not adjoining nor parcel thereof, nor connected therewith by any intervening structure, and that the dwelling house was not burned by the burning of the barn, the defendant cannot be convicted under this indictment." *Answer.* "We decline to charge you as requested in this point. We say to you that if you find that the barn which was destroyed was a part of the necessary buildings used on the Barclay farm, and was so situated that its destruction by fire would endanger the dwelling house on the same premises, then the barn 'belonged to' the dwelling house, as contemplated by the 137th Section of our Penal Code, and as set forth in this indictment."

Verdict, guilty in manner and form as indicted. The prisoner was sentenced to pay a fine of \$500, and to be imprisoned in the Eastern Penitentiary for ten years. The defendant took this writ of error, assigning for error the answer to the above point.

For plaintiff in error, *Clinton Lloyd, Esq.*

The court in their answer to the point failed to distinguish between the two offenses set forth in the 137th and 138th Sections; if the defendant was guilty at all, the facts as stated in the point brought the case within the 138th Section, which makes the acts therein mentioned a misdemeanor, and not a felony.

Contra, Messrs. John J. Reardon and J. J. Metzger.

Opinion by PAXSON, J. Filed October 3, 1881.

The single assignment of error in this case involves the proper construction of the 137th Section of the Penal Code. The plaintiff in error was convicted of arson in setting fire to a barn. Upon the trial below, his counsel asked the court to instruct the jury "that if they believe from the evidence that the barn mentioned in the indictment was located at some distance from the dwelling house, not adjoining nor parcel thereof, nor connected therewith by any intervening structure, and that the dwelling house was not burned by the burning of the barn, the defendant cannot be convicted under this indictment." The court answered

the point as follows: "We decline to charge you as requested in this point. We say to you that if you find that the barn which was destroyed was a part of the necessary buildings used on the Barclay farm, and was so situated that its destruction by fire would endanger the dwelling house on the same premises, then the barn belonged to the dwelling house as contemplated by the 137th Section of our Penal Code."

The dwelling house was not burned and it was contended, that for this reason the plaintiff could not be properly convicted under the 137th Section, which refers to felonious arson, but should have been indicted under the 138th Section, which defines a lower grade of burning and punishes it as a misdemeanor only.

A careful consideration of the 137th Section leads us to the conclusion that the learned judge of the court below was correct in his ruling. The section referred to defines and punishes three classes of felonious arson, viz: (1) The burning of or setting fire to any factory, mill or dwelling house of another; (2) The burning of or setting fire to any kitchen, shop, barn, stable or other outhouse, that is parcel of such dwelling, or belonging or adjoining thereto; and (3) The setting fire to or burning of any other building by means whereof a dwelling house shall be burned. In the cases mentioned in the last class, viz., "any other building," that is to say, than those enumerated in the first and second classes, it would be necessary in order to convict, to aver and prove that a dwelling house had been burned by means of the particular act charged against the defendant. It is manifest the words "by means whereof a dwelling house shall be burned" have no application to the first class, as dwelling houses are included in that class. We think it equally clear that they do not apply to the second class. This class comprises only such buildings, the burning of which by reason of their proximity to a dwelling house would endanger the safety of the latter. They must be "parcel of such dwelling or belonging or adjoining thereto." This language is explicit. The Legislature have employed apt words to express their meaning. It was intended to reach just such a case as this. As farm buildings are constructed in this State, it is seldom the barn adjoins the house; it may not even be parcel of it; but the word "belonging" is comprehensive and includes all barns so near a dwelling house on the same premises as to endanger the safety of such house in case of fire. The burning of any building so situated as to endanger a dwelling house, was felonious arson at common law: Wharton's Criminal Law, § 1668. This was

always a serious offense, and we are not to presume in the absence of such clearly expressed intent, that the Legislature intended to reduce it to the grade of a misdemeanor.

This view is not in conflict with the 138th Section, which makes the burning of barns, stables and other buildings not a parcel of a dwelling house, a misdemeanor. This section was manifestly intended to provide for the burning of a barn that is not parcel of a dwelling house, nor belonging nor adjoining thereto, and which is so situated as not to endanger a dwelling house. Thus considered, the two sections are harmonious.

Judgment affirmed.

CHASE, to use of WATSON and PIERCE, v.
HUBBARD et ux.

In an action on a bond executed by a *feme covert* and her husband, to secure the purchase money of land sold to them, the court, on a plea of coverture, instructed the jury that there could be no recovery against the *feme covert*, on the ground that at the time of executing the bond she was a married woman. *Held*, to be error. But where all the facts of the case are developed upon another plea, and the jury, upon those facts, render a verdict in favor of the *feme covert* and her husband, *held*, that it renders the technical ruling of the court below on the plea of coverture of no moment whatever.

Error to the Court of Common Pleas of Crawford county.

Opinion by GORDON, J. Filed January 2, 1882.

On the 6th day of February, 1871, Edward H. Chase and Sarah A. Chase sold and conveyed a lot of ground in the city of Titusville to the defendants, Asher S. Hubbard and Mary E., his wife, for the sum of four thousand dollars, one thousand dollars of which were paid in hand on the delivery of the deed, and the balance was secured by a judgment bond and mortgage. On the 19th of November, 1877, judgment was entered on this bond in the sum of \$1,054.94, that being the amount alleged to be then due and unpaid. On the judgment thus entered execution was issued to September Term, 1879, and afterwards, on application of the defendants, the court opened this judgment as to all of it in excess of \$743.54, with the interest thereon from July 9, 1877, equal to \$840.44, which were paid into court. The judgment being thus opened, the parties went to trial on the pleas of "payment with leave," and, as to Mary E. Hubbard, "coverture." On this latter plea, the court instructed the jury: "If you find that Mary E. Hubbard at the time of the execution of this bond was a married woman, there can be no recovery in this case as against her."

In view of the fact that the bond was executed by the *feme covert* and her husband to secure the purchase money of land sold to them, this ruling was erroneous. As this question has been fully discussed and settled in the case of *Snyder v. Noble*, 28 PITTSBURGH LEGAL JOURNAL, 368, we need give it no further attention, and were there nothing more in the pending suit, the judgment must be reversed. But on the plea of payment the facts were fully developed, and the jury, on those facts, found for the defendants. As therefore Asher S. Hubbard, the co-obligor and mortgagor, with his wife, was not protected by the plea of coverture, it follows that the jury must, under the evidence, have found either that the mortgage was paid, or, what is practically the same thing, that Hubbard and his wife were equitably discharged from the payment thereof. Under these circumstances, it seems clear to us that the ruling of the court below on the plea of coverture did the plaintiffs no possible harm.

We think a brief review of the facts as found by the jury will demonstrate the rectitude of this conclusion. In May, 1871, Hubbard and wife conveyed the one-half of the mortgaged premises to A. H. Carr for two thousand dollars; one-half of this sum was paid by Carr to his vendors, and the other half he agreed to pay on the Chase mortgage. For this amount he also gave to the defendants his note, which, it seems, was never paid. This, however, is of no moment, inasmuch as the property thus sold was subject to the Chase mortgage, and, under the arrangement between the defendants and Carr, if they were at any time forced to pay off this mortgage, they would be entitled to subrogation as to Carr's part of the property. Then, in January, 1879, Watson and Pierce, the use plaintiffs, with knowledge, as the jury have found, of the arrangement between the defendants and Carr, took an assignment of the Chase mortgage, and afterwards, on the 11th of September of the same year, a sheriff's deed, made under a sale of Carr's interest in the property, on a judgment of P. T. Winthrop, was obtained by F. B. Guthrie, Esq., the agent or trustee of Watson and Pierce. This sale was expressly made subject to the mortgage above mentioned. The transaction then stands thus; Watson and Pierce, now the owners of the Chase mortgage, buy Carr's interest in the premises not only subject to that mortgage, but with full knowledge of the agreement between Carr and the defendants.

Now, let us suppose that Hubbard and wife pay off this mortgage to Watson and Pierce, what would prevent them from claiming subrogation as against the land now owned by these

very plaintiffs. For, to repeat, on the notice given by Guthrie himself, this land was bought subject to the mortgage, and all there was of it were the thousand dollars which Carr, or Carr's land, was to pay. But as it would be to no purpose to compel the defendants to pay that in relief of the plaintiffs' property, which they would be entitled to recover back by the process of subrogation, the object is better accomplished by the release of the defendants from the payment of the mortgage and its accompanying bond.

The verdict then, which to us seems but reasonable and just, founded as it is upon the facts above detailed, renders the technical ruling of the court below on the plea of coverture of no moment whatever, since the result could not have been altered had the ruling been the converse of what it was. *Judgment affirmed.*

For plaintiffs in error, *Messrs. Guthrie & Byles.*
Contra, Messrs. Neill & Heywang and S. Grumbine

WEAVER v. FRANTZ.

In a suit by an indorsee of a promissory note against the maker, evidence is admissible, on behalf of the defendant, that the note was in fact given for a patent right, and was not so marked, as required by the Act of April 12, 1872, *Purd. Dig.*, 1173, pl. 3, 4, and that the plaintiff had actual knowledge of the consideration at the time he took the note. If these facts are proved, they constitute a good defense to the action.

Where the seller guaranteed that the patented machines, for which the note was in part given, were of good quality, the defendant, in an action by an indorsee with actual knowledge of the consideration of the note, may introduce evidence that the machines proved worthless.

Where an offer of testimony is made, involving several distinct matters, it is proper for the court, in admitting the offer, to control the order of proof.

Error to the Court of Common Pleas of Lycoming county.

Assumpsit by indorsee against maker on a promissory note in the usual form.

On the trial, before CUMMIN, P. J., the plaintiff put the note in evidence and rested.

The defendant offered to prove that the note was given by him to the payee for the purchase of certain patented "grain separators," and for the right to use and sell the same in a particular district; that the payee guaranteed the machines were of good quality and would do certain work, but they proved to be useless and worthless; and that the plaintiff at the time the note was negotiated to him knew of the said consideration and guarantee. Objected to; objection overruled and offer admitted, the evidence to be produced in the following order: what was the consideration of the note; that

the plaintiff knew what the consideration was; the merits of the defense, if any. Exception.

Verdict and judgment for the defendant. The plaintiff took this writ, assigning for error, *inter alia*, the admission of the defendant's offer of evidence as above.

For plaintiff in error, *Messrs. H. Ames and H. C. McCormick.*

Contra, Messrs. William J. Hart and John J. Metzger.

Opinion by STERRETT, J. Filed October 3, 1881.

The plaintiff having given in evidence without objection, the defendant's note at six months from July 26, 1877, indorsed by the payees, W. H. Hogas & Co., was, *prima facie*, entitled to a verdict for the amount of his claim. To meet the case thus presented, the defendant relied substantially on the following grounds of defense:

1st. That the consideration of the note was the right to use and vend a patented invention, and the words, "given for a patent right," were neither written nor printed on the face of the note, as required by the Act of April 12, 1872; that the plaintiff acquired the note with full knowledge of these facts, and in so doing violated that clause of the act which makes it a misdemeanor for any one knowingly to take, sell or transfer any such note; and hence he had no right to recover. This defense is grounded solely on the penal clause of the statute, and the principle invoked is that a court of justice will not lend its aid to any one whose claim originated in the commission of a criminal act, and to which he was voluntary a party.

2d. That as against the payees of the note he had a good defense in this, that they guaranteed the patented machinery, for which the note was given, to be of good quality, and to do certain work, but, after a fair trial, it proved to be worthless, and consequently the consideration of the note failed; that plaintiff, having taken the note with knowledge of its consideration, and the omission to comply with the requirements of the statute aforesaid, was not a *bona fide* holder, and hence the note in his hands was subject to the same defense that existed against the payees.

If the first ground of defense was sustained, the second of course became unnecessary, but the defendant had a right to introduce testimony bearing on each and ask the court to pass upon the questions of law arising thereon.

The object of the act requiring the words above quoted to "be prominently and legibly written or printed on the face of the note," was

to give notice of its consideration, and, in connection therewith, make the note non-negotiable. With the latter purpose in view, it is declared that "such note or instrument in the hands of any purchaser or holder shall be subject to the same defense as in the hands of the original holder." The defendant contended that inasmuch as plaintiff took the note with actual notice of the consideration, etc., he was at least in no better position than if he had been warned in the manner contemplated by the act; and hence the note thus in his hands was subject to the same defense, that it must be in the hands of the payees. It cannot be doubted he had a right to present this defense for the consideration of the court. If the case was afterwards submitted to the jury on the broader ground that the plaintiff had no right to recover at all, if in taking the note he knowingly violated the penal clause of the statute, he has no reason to complain, because he did not except to the charge of the court.

We do not mean to intimate that an exception would have been of any avail. On the contrary, we think it would not. The charge of the learned judge is in full accord with the construction given to the act in *Hunter v. Henninger*, 37 *Legal Intell.*, 412, in which it is said: "The Act of April 12, 1872, was intended to destroy the negotiable character of notes given in whole or in part for the right to make, use or vend any patent invention, in order that the makers thereof might have the right to defend as well when said notes were passed to third parties, as when in the hands of the original payees. In furtherance of this intent, the act requires the indorsement, 'given for a patent right,' to be marked across the face of the note. * * * Without this, of course, the innocent purchaser for value would not be affected. Not so, however, as to one knowing the consideration of a note given for a patent right, for such an one is by the act guilty of a misdemeanor if he receives this kind of paper without having the words above stated written upon its face. It follows that if the plaintiffs through Druman received the note in suit, knowing it was given for the right to vend or use the patent grinders, they received it in fraud of the statute, and were for that reason not entitled to recover." This language is equally applicable to this case.

There was no dispute as to the consideration of the note; but there was some conflict of testimony, as to whether the plaintiff, at the time he purchased it, knew it was given for a patent right. That was a question of fact for the jury. It was fairly submitted to them under properly

guarded instructions, and they found in favor of the defendant.

From what has been said in regard to the nature and character of the defense, it is evident there was no error in admitting the testimony complained of in the first assignment. The order of the prosecution was properly controlled by the court, and this was all the plaintiff could reasonably ask. The second and third assignments are not sustained. In connection with other evidence in the case, the testimony complained of was not improperly admitted.

Judgment affirmed.

T. H. BAIRD PATTERSON, Administrator, Defendant Below, v. AMBROSE A. McCARTY.

Where a broker contracts to secure a loan payable in installments, for which service he is to be paid a certain commission, he is still entitled to a commission if the loan is negotiated through his instrumentality upon different terms satisfactory to his principal, unless the contract with his principal was that he should receive no commissions if the loan should fail to be negotiated upon the original terms.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

In the year 1878 it was deemed advisable by the parties interested in the estate of Joseph Patterson, deceased, to improve certain real estate, belonging to the estate, situated in the city of Pittsburgh. To accomplish this object it became necessary to borrow \$64,000, to be secured by mortgage upon the property to be improved. In the furtherance of this purpose, T. H. Baird Patterson took out letters of administration *de bonis non cum testamento annexo* upon the estate, and was also appointed trustee to represent certain interests that might possibly come into existence, and was authorized to join with the devisees under the will in the execution of a mortgage to be given for the loan required.

During the pendency of the proceedings Ambrose A. McCarty, a broker, was informed by the attorney of the Patterson estate that a loan was desired, and immediately entered into negotiations with Mr. Patterson to procure the money. The loan was effected, and upon failure to receive his commission for services rendered in securing the loan, Mr. McCarty brought the present action. Upon the trial it was alleged by Mr. Patterson that it was agreed between Mr. McCarty and himself that the loan was to be secured, payable in installments from time to time as it might be wanted; that interest was only to run upon each installment from the time it was paid, and if the money was not obtained in that way McCarty was to have no

commission or compensation for his services. This was denied by McCarty, and the question raised by this issue of fact was the subject of the fourth point referred to in the opinion below.

A verdict was rendered for the plaintiff below and judgment entered without being limited *de bonis testatoris*.

Several points were raised by the defendant below as to the jurisdiction of the court in view of the trust, and as to the individual liability of the defendant, but not having been considered material by the court above, will not be reported here.

The fourth point submitted to the court by the plaintiff below was as follows:

"4th. Even if the contract was that the plaintiff should procure a loan payable in installments, and receive one-half per cent. commissions therefor, still if the defendant, through the introduction of the plaintiff, was led to negotiate with the Finance Committee of the Western University and took the negotiation into his own hands and actually borrowed the money upon terms satisfactory to himself, though not payable in installments, the plaintiff would still be entitled to commissions."

"Answer. Affirmed, unless you shall find from the evidence that no commissions were to be paid unless the loan was so obtained, as claimed by defendant."

For plaintiff in error, defendant below, *J. S. Ferguson, Esq.*

Contra, *Hon. Thos. M. Marshall and Messrs. Kennedy & Doty.*

PER CURIAM. Filed November 14, 1881.

The law was correctly laid down by the learned court below in their answer to the defendant's fourth point, and the question of fact in the case was fairly submitted to the jury. The other assignments raise no material question, and there is no doubt that the plaintiff having declared against the defendant as administrator and trustee, the contract having been made by him, was no reason why a recovery should not be had against him *de bonis propriis*.

Judgment affirmed.

Orphans' Court.

In Re. Estate of WILLIAM OLIVER, Deceased.

A guardian's account was filed and confirmed more than five years after his death by his administrator, showing a balance in his hands due his wards, and an application having been made to compel the administrator to sell decedent's real estate for the payment of this balance, the statute of limitations (five years) was pleaded. Held, that the case was not within the statute.

Opinion by HAWKINS, P. J. Filed June 28, 1882.

The question involved in this case is ruled by a principle established in *Commonwealth v. Moltz*, 10 Pa. St., 527. In that case the administrators of a deceased guardian filed an account of his trust more than five years after his death, showing a balance in his hands; and suit having been brought against his sureties on his bond, the statute of limitations was set up as bar to the plaintiff's recovery. The court said: "But, to say nothing of the decree, which is in the nature of a judgment, and therefore not within the act, the case presents a direct and express trust, over which, in the first instance, the Orphans' Court has exclusive jurisdiction. The act has no terms that can be made to embrace claims of this character. This has been so repeatedly settled, that it is only necessary to refer, among the multitude of cases, to *Thompson v. McGaw*, 2 W., 161; *Doebler v. Snaveley*, 5 Id., 225, and *Patterson v. Nichol*, 6 Id., 379. It is obvious, this defense would not be open to the guardian, were he alive, nor is it more available to his personal representatives; for none of the statutes that have relation to remedies for the recovery of decedent's debts, are applicable here. It is obvious, then, that there is no such *laches*, from mere running of time, as could operate to bar the claim of the ward against her living guardian. Were he in existence, nothing that has been suggested in the progress of the investigation could shield him from the successful attacks of the plaintiffs:" *Vincent v. Watson*, 40 Pa. St., 306.

No case has been cited and none has been found, after diligent search, in which this principle has been overruled.

The delay in instituting proceedings here is satisfactorily explained by the evidence of the conduct of administrator, who is also one of the heirs. It was at his instance, and in consideration of a special agreement made with him to pay interest on the amount owing, that time was given. And it was clearly to the advantage of the deceased guardian's estate that time was given. The claim was large, and had it been pushed would, in all probability, have caused serious embarrassment in the settlement of the estate. There is no doubt about the validity of the claim. It was not disputed in the distribution of the personal estate of decedent, and received a distributive share from it.

There is, therefore, neither law nor equity to support the objection made to the relief asked.

For petitioner, *E. P. Jones, Esq.*

For respondent, *D. T. Watson, Esq.*

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Supreme Court, Penn'a.

FISHER v. CONNARD et al.

Generally throughout this Commonwealth, except when it is otherwise provided by special local acts, a sheriff's sale of real estate upon any junior encumbrance will divest the lien of a prior mortgage if there be any tax, charge, assessment or municipal claim still remaining unpaid, which has been duly entered against said real estate prior to the recording of said mortgage.

The provisions of the Act of March 23, 1867, § 3, P. L., 44, were intended to protect the divestiture of the lien of a first mortgage by a judicial sale under a junior encumbrance, both where a municipal claim has been filed against the mortgaged premises which, although accruing subsequently to the record of said mortgage, has by law priority given to it, and also where any taxes, charges or assessments are filed under similar circumstances, which have by law a similar priority given to them. The provisions of said act are not intended to protect the divestiture of the lien of such mortgage by a sale under a junior encumbrance where taxes, charges or assessments against the mortgaged premises have accrued and claims therefor have been filed prior to the recording of said mortgage.

Error to the Court of Common Pleas of Berks county.

Scire facias sur mortgage by Henry Jackson and Henry Connard, executors of Thomas Jackson, deceased, against Daniel B. Fisher, with notice to terre-tenants. The mortgage in suit was given by Daniel B. Fisher to Thomas Jackson upon certain real estate in the city of Reading. It bore date June 1, 1877, and was recorded June 9, 1877.

David B. Fisher being served as terre-tenant, appeared and pleaded "payment with leave," etc.

On the trial, before SASSAMAN, J., plaintiffs put the mortgage in evidence and rested. The terre-tenant then offered to show by the records of the Court of Common Pleas of Berks county, Pa., that the premises described in the mortgage, already offered in evidence, were sold at sheriff's sale by the sheriff of Berks county, as the estate of Daniel B. Fisher, on the 13th day of December, 1879, on *vend. ex.* No. 59 December Term, 1879, *David B. Fisher v. D. B. Fisher*, for \$3,308.28, and that the said premises were purchased at said sale by David B. Fisher, the plaintiff in the *vend. ex.*, now the terre-tenant; that the judgment upon which the sale was had

was entered to No. 132, October Term, 1879; that at the date of the said sheriff's sale the mortgage in suit, as will appear from the records offered in evidence, was subsequent in date and entry of record to a lien for taxes on same premises filed by the city of Reading, May 29, 1877, for \$40.19, to No. 151 May Term, 1877, which lien still remains unsatisfied of record. This was offered for the purpose of showing that the premises specified in the mortgage were divested by said sheriff's sale from the lien of the mortgage, and there could be no verdict in this action against the terre-tenant.

The records also showed a lien filed against said premises, May 29, 1877, by the Reading School District for \$20.19 for school tax.

Plaintiffs objected to the offer of evidence, because (1) Under the Acts of Assembly the lien of a mortgage is not discharged by a sale on a junior judgment because of a lien for taxes prior to the mortgage; (2) Because as the tax lien was not discharged by the sheriff's sale, the mortgage in suit was not discharged.

The court. "From the admitted facts in the argument of his offer it appears that the lien in favor of the *City of Reading v. Daniel B. Fisher*, 151 May Term, 1877, is a city tax lien under our municipal legislation, which, for the purposes of this trial, we will hold to be comprehended under the provisions of the general Act of Assembly approved 23d November, 1867, and which is in extension of the exceptions to the exceptions contained in the Act of 6th April, 1830, for the preservation of the liens of mortgages prior to other liens. The offer is rejected and bill sealed for defendant."

Verdict and judgment for plaintiffs, whereupon defendant took this writ, assigning for error the rejection of his offer of evidence.

For plaintiff in error, *Frank R. Schell, Esq.*
Contra, Jeff. Snyder, Esq.

Opinion by PAXSON, J. Filed April 24, 1882.

The mortgage in suit was recorded on the 9th day of June, 1877. On the 29th day of May, 1877, the city of Reading filed a lien against the mortgaged premises for city taxes, amounting to \$40.19. On the same day a lien was filed against the same premises by the Reading School District for school tax, amounting to \$20.19. Each of these liens, as will be noticed, antedates the mortgage. During the year 1879, while the record stood in this condition, the mortgaged premises were sold by the sheriff upon a junior judgment, to the mortgagor himself for the sum of \$40, and the purchase money was applied to the tax lien of the city of Reading, above referred to. Subsequently, a *scire*

facias was issued upon the mortgage, and the only question raised upon the trial below was whether the sheriff's sale discharged the lien of the mortgage by reason of the prior registered liens for taxes. The learned judge held that the mortgage was protected by the Act of 23d November, 1867, and this ruling is the only error assigned.

It was held in *Willard v. Norris*, 2 Rawle, 56, that "when land subject to a mortgage is sold under a judgment obtained subsequently to the execution and recording of the mortgage, the purchaser at sheriff's sale takes the land discharged of the lien of the mortgage." This decision was the occasion of the passage of the Act of 6th April, 1830, P. L., 293, the first section whereof provided that "where the lien of a mortgage upon real estate is or shall be prior to all other liens upon the same property, except other mortgages, ground-rents and the purchase money due to the Commonwealth, the lien of such mortgage shall not be destroyed, or in any way affected, by any sale made by virtue or authority of any writ of *venditioni exponas*."

This act operated to the protection of mortgages in many instances. It failed of its object, however, in the county of Philadelphia, for the reason that the Act of 3d of February, 1824, declared that all taxes, rates and levies on real estate in said county shall be a lien on said real estate and the said lien "shall have priority to, and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility which the said real estate may have become charged with or liable to from and after the passage of this act." This defect in the Act of 1830 was remedied, so far as Philadelphia is concerned, by the Act of 11th April, 1835, P. L., 190. In other portions of the State, where by law priority was given to tax liens, and to which the Act of 1835 had not been extended, the same trouble existed, and there was the same insecurity of mortgages. There are other subsequent acts tending to the repose of mortgages, which are local to the county of Philadelphia, and to which further reference is unnecessary.

The Act of 23d of March, 1867, P. L., 43, is a general law, and was intended, as its title plainly implies, for "the preservation of the lien of mortgages." The third section thereof reads as follows:

"When the lien of a mortgage upon real estate is, or shall be prior to all other liens upon the same property, except other mortgages, ground-rents, purchase money due to the Commonwealth, taxes, charges, assessments and municipal claims, whose lien, though after-

wards accruing, has by law priority given it, the lien of such mortgage shall not be destroyed, or in any way affected by any judicial or other sale whatsoever, whether such judicial sale shall be made by virtue or authority of any order or decree of any Orphans' or other Court, or any writ of execution, or otherwise howsoever: *provided*, that this section shall not apply to cases of mortgages upon unseated lands, or sales of same for taxes."

It will be noticed that so far as regards the prior liens of "mortgages, ground-rents and purchase money due to the Commonwealth," this act does not extend the provisions of the Act of 1830, excepting that it applies to all judicial sales, including those ordered by the Orphans' Court. It introduces, however, into the general law of the State another class of liens from which the lien of mortgages is protected, viz., "taxes, charges, assessments and municipal claims, whose lien, though afterwards accruing, has by law priority given it," and the apparent difficulty in the case consists in the proper construction of this last clause. It was argued with much learning and ability by the counsel for the defendant in error that the proper antecedent of the word "lien" is "municipal claims," and that it is to such claims only that the words, "whose lien, though afterwards accruing, has by law priority given it," applies. The effect of this construction, if adopted, would be to lift "taxes, charges and assessments" out of the operation of the subsequent qualification and place them upon the same plane with prior "mortgages, ground-rents and purchase money due to the Commonwealth." The grammatical construction of a statute is one mode of interpretation. But it is not the only mode, and it is not always the true mode. We may assume that the draftsman of an act understood the rules of grammar, but it is not always safe to do so. The Act of 1867 was evidently passed with reference to preceding acts, in regard to taxes. In many of these acts the words "taxes, charges, assessments and municipal claims" had been used together, and in connection with the word "lien." This was so in the Philadelphia Acts of 16th of April, 1845, P. L., 488, of 23d of January, 1849, P. L., 686, and the Allegheny Act of 5th of April, 1844, P. L., 199. Our best judgment is, that "taxes, charges, assessments and municipal claims," in the Act of 1867, were all intended as antecedents of the word "lien," and if this makes good law, the grammatical construction is not so important.

In this view the manifest object of the Act of 1867 was to protect mortgages from liens subsequently accruing, but which by law have pri-

ority given them. The two liens entered before the mortgage in suit do not come within this description. They did not accrue after the recording of the mortgage. They not only accrued before, but were entered of record prior to the mortgage. They were therefore notice to the mortgagee, and as to them he needed no protection. He had the knowledge and the means to protect himself.

In the *Rhein Building Association v. Lea*, decided at this term, we held that the Act of 1867 did not apply. But that case came up from Philadelphia, and was decided upon local acts, which we held were not repealed by the Act of 1867.

Judgment reversed and venire facias de novo awarded.

ETTER AND SNYDER v. GREENAWALT.

A devisee who accepts a devise which is coupled with a direction by the testator that the devisee shall pay a sum of money to another renders himself personally liable to pay such sum. This is so whether the legacy is or is not made a charge on the land devised.

The statute of limitations applies to any action brought after six years to enforce such implied contract, except as to persons exempted in the proviso, including married women.

The rule that the statute of limitations does not apply to an action against executors for a legacy, does not apply to a suit against a devisee to recover a legacy which the testator directs him to pay.

Error to the Court of Common Pleas of Franklin county.

Debt by Susannah Etter and Nicholas Snyder and Eliza Snyder, his wife, in right of said Eliza, against Henry Greenawalt.

The writ issued February 2, 1880.

The *narr.* contained the usual money counts, and a special count setting forth that by reason of the defendant having excepted a devise under a clause in the will of Godfrey Greenawalt, deceased (quoted below), he became indebted to the plaintiffs, etc. Pleas, payment, payment with leave, and "that defendant is not indebted to the plaintiffs in the manner charged," and the statute of limitations.

On the trial, before ROWE, P. J., the following facts appeared: Godfrey Greenawalt, the father of the plaintiffs, Mrs. Etter and Mrs. Snyder, and of the defendant, by his will, proved in 1847, devised as follows:

"I do hereby devise to my said son Henry my undivided half-part of the piece of land known as the Palmer tract, containing in all about forty-one acres, for which latter devise I will and direct that Henry shall pay in equal proportions to my two married daughters, Susannah Etter and Eliza Snyder, for their own separate and exclusive use, at the rate of twenty dollars per acre, the same to be paid in four equal annual installments, the first of which is to become due and payable at the expiration of five years after my decease."

Henry Greenawalt accepted the devise.

The plaintiff, Susannah Etter, is a widow, her husband having died in 1871. The plaintiff, Eliza Snyder, is still a married woman.

The defendant alleged that he had paid \$200 to each of the plaintiffs in annual installments according to the terms of the devise, and offered in evidence certain receipts alleged to have been signed by the plaintiffs, by their marks, therefor. The plaintiffs admitted receipt of the \$200, but alleged that it was for a compromise in a collateral matter, and that they were ignorant of their rights under the will. The evidence on this subject was, however, weak. The defendant being unable to prove the execution of the receipts, they were, with one or two exceptions, excluded.

The defendant submitted the following point: "The right of action in this case not having accrued within six years next before the bringing of the same, the plaintiffs cannot recover." The court reserved this point and submitted the case to the jury on the question of payment.

Verdict for the plaintiffs for \$1,089.69. The court subsequently entered judgment on the reserved point for the defendant, *non obstante veredicto*. ROWE, P. J., filed an opinion, holding that in an action of debt against a devisee of land for a legacy such as this, which is admitted not to be a charge on the land, the statute of limitations is applicable; also that since the removal by legislation of the disability of a married woman to sue at law as well as in equity, she is no longer within the spirit of the proviso of the statute of limitations of 1713, exempting *femes covert* from the operation of that act.

The plaintiffs took this writ, assigning for error the entering judgment for defendant on the point reserved, *non obstante veredicto*.

For plaintiffs in error, *Messrs. J. McD. Sharpe and Stenger & McKnight*.

Contra, Messrs. Kennedy & Stewart.

Opinion by GREEN, J. Filed October 3, 1881.

This was an action of debt brought against the defendant by his two sisters, one of whom was a widow and the other a married woman. The right of action upon which the suit was founded was an alleged liability of the defendant to pay to his sisters, the plaintiffs, a sum of money which he was directed by his father's will to pay to them in consideration of a tract of land devised by the will to him. The language of the will as to the payment of the money is, "for which devise I will and direct that Henry shall pay in equal proportions to my two married daughters, Susannah Etter and

Eliza Snyder, for their own separate and exclusive use, at the rate of twenty dollars per acre, the same to be paid in four equal annual installments, the first of which is to become due and payable at the expiration of five years after my decease."

The testator died in December, 1847, and the action was not brought until 1880. The only question brought here is, as to the effect of the plea of the statute of limitations, which was sustained by the court below as to both the plaintiffs. Mrs. Etter became discoverd in February, 1871, by the death of her husband. Mrs. Snyder is still covert, and her husband has joined in the suit. The case was argued and decided in the court below, upon the concession that this is not the case of a legacy charged on land, and that an action of debt was, therefore, the proper remedy. As the payment of the money to the sisters was, apparently, under the peculiar phraseology of the will in part, at least, the *consideration* of the devise to the defendant, we are not prepared to assent to the correctness of the concession.

But that question is not before us, and, therefore, we forbear either its decision or its discussion. On the general question of the application of the statute of limitations to the liability of the defendant we concur with the learned court below in holding that the obligation of the defendant is subject to the operation of the act. By accepting the devise he agreed to pay the sum given to his sisters according to the terms of the will. That agreement is an implied contract without specialty, and is therefore within the letter of the Act of 1713. All the cases hold that when the devisee accepts the land in such circumstances, he thereby agrees to pay the money which he is by the will directed to pay. He becomes subject to a personal liability to pay, and that, too, whether the money is charged on the land or not. Thus, in *Brandt's Appeal*, 8 Watts, on page 202, we said: "If the sons accepted the lands devised, they became personally liable to pay the legacies, at the times and in the payments directed in the will; if not paid the legatees could sue and recover them by levy and sale of any goods or lands of the devisees." In *Lobach's Case*, 6 Watts, 167, we held that the acceptance of a devise of land, charged with the payment of a legacy, creates a personal liability for its payment on the part of devisee. On page 170, KENNEDY, J., speaking of the effect of the acceptance of the land by the devisees, said: "This, perhaps, without more, ought to be considered sufficient evidence, in ordinary cases, to establish an agreement on the part of the devisees to take the lands devised to

them upon the terms and conditions set forth in the will; and likewise of an engagement on their part to fulfill and perform them, whatever they may be." See, also, *Miltenberger v. Schlegel*, 7 Barr, on page 243, and the cases there cited.

Now, an engagement, undertaking, or agreement to pay, is substantially a contract to pay. Such, certainly, is its status in legal contemplation. The law recognizes and enforces the obligation, and it can only do so upon the footing of a contract. The terms of such contracts as the present are found in the will, and the obligation to comply with those terms is implied from the acceptance of the devise.

We do not consider it is any reply to the plea of the statute to say that this is an action for a legacy, and in such cases the statute is not a bar. That is true in the ordinary actions for legacies against executors, and the reason is that the liability of an executor to pay a legacy is not grounded upon any lending or contract. He is a trustee who is charged by the will with the performance of the duty of paying legacies, and against that form of obligation the statute of limitations is no bar. The case of *Thompson v. McGaw*, 2 Watts, 163, cited for the plaintiffs, is decided upon that very ground.

We are, therefore, of opinion that the plea of the statute is a good bar to the cause of action set up in the present case. As Mrs. Etter was *sui juris* more than six years before suit brought, the defense was good as to her.

But the case of Mrs. Snyder stands upon a different footing. She was a married woman at all times since her legacy became due, and she is still married. The learned judge of the court below thought that she could not take advantage of the exception in favor of married women in the Act of 1713, and that the plea of the statute was a good bar to her claim also. His reasoning is certainly very forcible if the proposition were as to how the law ought to be in such cases. But we must confront the positive terms of a statute directly and literally applicable to the case, and here we consider there is no alternative. The language of the third section of the Act of 1713 is most explicit, and it provides in express terms that several classes of persons under disabilities are not barred by the statute until six years after they have recovered their ability. These persons are those who are "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the sea." The privilege of freedom from the liability to the statute is common to them all. No one of the classes is more entitled to the exemption of the third section than any other. This statutory

exemption has never been repealed expressly or by implication. It is the law of the Commonwealth at this day, and we must respect it. The plaintiff, Mrs. Snyder, comes directly within its terms, and is entitled to its benefits. As to her, therefore, the plea of the statute of limitations is no bar, and it is overruled.

The judgment in favor of the defendant as against the plaintiff, Susannah Etter, is affirmed. The judgment in favor of the defendant as against the plaintiffs, Nicholas Snyder and Eliza, his wife, in right of the said Eliza, is reversed, and as to them, a writ of venire facias de novo is awarded.

AUER v. PENN.

It is a well settled rule in this State that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term and sending the key to his landlord.

Liability of surety on contract of lease.

Error to the Court of Common Pleas, No. 1, of Philadelphia county.

Opinion by PAXSON, J. Filed February 13, 1882.

Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term and sending the key to his landlord. The reason for it is that in the absence of fraud one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice ROGERS, in *Marseilles v. Kerr*, 6 Wharton, 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release, or an eviction, will undoubtedly relieve a tenant, and it was said by Chief Justice GIBSON, in *Fisher v. Milliken*, 8 Barr, 111, that nothing less would do so. This remark, however, was without the authority of the court and must be regarded as *dictum*. The case in hand does not require us to assert so broad a proposition. There was neither a release nor an eviction here, but the surety claimed to be discharged because, after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretense that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant below that he would hold him for

the rent. This notice was repeated on more than one occasion, when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant and must prove it. When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any. It was said in *Breuckman v. Twibill*, 8 Norris, 58, that "taking possession, repairing and advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.

Upon the trial in the court below, the learned judge instructed the jury as set forth in the second assignment of error, as follows: "If a man refuses to continue your tenant, gives up the house into your hands, why then you have a right to put a bill upon the house and try to rent it, because if you rent it, it is so much saved to Mr. Auer, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house; and certainly it is much better for the tenant that the landlord should rent the house and get something for it, than to simply lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender, that he has taken and leased the house."

We see no error in this. It is good sense as well as good law. We are not aware of any authorities in this State which are in conflict with the foregoing views. Those cited in behalf of the defendant below certainly are not.

The remaining assignments do not require

discussion. The fifth does not fully state the ruling of the court below. As it appears in the bill of exceptions it is entirely correct.

Judgment affirmed.

HEATH'S APPEAL.

A mere naked verbal agreement on the part of a purchaser at a judicial sale to hold property purchased at said sale with his own money for the benefit of the defendant in the execution will not raise a trust in said purchaser for said defendant.

Where, however, said purchaser is the plaintiff in the execution, and by reason of the agreement entered into by him with defendant, persons are prevented from bidding at the sale, properties which would otherwise be sold separately are sold together, and a certain part of the costs of said sale are paid by defendant, these circumstances will be held sufficient to raise in said purchaser a trust *ex maleficio* for said defendant.

Dollar Savings Bank v. Bennett, 26 P. F. Smith, 402, distinguished. *Sweetzer's Appeal*, 21 P. F. Smith, 264, and *Christy v. Pittsburgh Savings Bank*, 28 PITTSBURGH LEGAL JOURNAL, 101, followed.

Appeal of William H. Heath from a decree of the Court of Common Pleas of Lackawanna county, sustaining a demurrer to and dismissing a certain bill in equity between the appellant complainant, and one Joseph Slocum, defendant.

The averments of the bill were as follows: On March 12, 1878, the defendant, Slocum, recovered judgment against complainant, Heath, in the sum of \$6,240. In August of the year 1879, the defendant caused execution to be issued on this judgment against several pieces of real estate belonging to complainant. Before the sheriff's sale took place, an agreement was entered into verbally between the complainant and defendant that the several pieces of land should be sold as one, and that they should be bought in by defendant at a nominal sum. Defendant further agreed upon payment to him of the amount of the judgment with interest within ninety days after the sale to reconvey the said several lots to complainant. The lots were accordingly sold together as one property. At the sale the attorneys of both complainant and defendant prevented persons from bidding by representing that the sale was for the complainant's benefit, and was in pursuance of an arrangement between the complainant and the defendant. In consequence of said representations, one bid made by a third party on said lots was withdrawn, and the whole were sold collectively for a nominal sum to the defendant, who subsequently received a sheriff's deed therefor. A portion of the costs of said sheriff's sale were paid by complainant.

Before the expiration of ninety days from the sale, complainant and defendant mutually

agreed that complainant should have until March 15, 1880, to pay the amount of the judgment with interest. Prior to that time, complainant made tender of said amount to defendant and demanded a reconveyance of the land. Defendant, however, refused to reconvey, denying that he had ever agreed so to do. The complainant prayed that the sheriff's sale and deed should be decreed a mortgage, and that upon payment of the amount of the judgment with interest, the defendant be decreed to reconvey the lots to complainant.

Defendant demurred to the whole bill on the ground that complainant had not set forth thereon such a cause of action as entitled him to be heard in a court of equity.

The court, HANDLEY, P. J., after argument, sustained the demurrer and dismissed the bill, saying, *inter alia*: "By sustaining this demurrer we expedite the final disposition of this case. It will be well on the road to the Supreme Court, and then it may or may not be located in that family of cases controlled by *Sweetzer's Appeal*, 21 P. F. Smith, 264, or in that family of cases controlled by the *Dollar Savings Bank*, 26 P. F. Smith, 402. It will be a great saving of time and money to all of the parties in interest to obtain, thus early, the opinion of the Supreme Court. It is, as we understand, what the parties most desire."

Complainant thereupon took this appeal, assigning for error the decree of the court.

For appellant, *Messrs. H. M. Edwards* and *S. B. Price*.

Contra, *Messrs. A. Ricketts* and *Jno. P. Albro*.

Opinion by PAXSON, J. Filed February 27, 1882.

The court below sustained the demurrer and dismissed the plaintiff's bill upon the ground that it sets forth no such cause of action as entitled him to be heard in a court of equity.

If the bill had set forth a mere naked agreement on the part of Slocum, the purchaser at the sheriff's sale, to hold the property purchased at said sale with his own money for the benefit of Heath, the appellant, the case would have been within the ruling in *Dollar Savings Bank v. Bennett*, 26 P. F. Smith, 402. There are averments in the bill, however, which take it out of this line of cases. They are: 1st. That by means of the arrangement referred to persons present at the sale were prevented from bidding; a bid on one of the pieces of land was withdrawn, and all the pieces were allowed to be sold collectively for a nominal sum. 2d. That in pursuance of an agreement to that effect, the appellant furnished a portion of the money neces-

sary to pay the costs of the sheriff's sale. Here is something more than a naked promise to hold the property in trust for Heath. Other bidders were silenced because they were told that Slocum was buying for the defendant in the execution; several properties, which the law required to be sold separately, were put up and sold in a lump for a nominal sum, while the costs of the sale were in part paid by Heath. We think the facts as set forth in the bill bring the case within the principle of *Sweetzer's Appeal*, 21 P. F. Smith, 264, where a sheriff's deed was held to be a mortgage, and the grantee named therein a trustee for the man whose land he had bought at sheriff's sale; and the more recent case of *Christy v. Pittsburgh Savings Bank*, 28 PITTSBURGH LEGAL JOURNAL, 101, where the purchaser at sheriff's sale, who had falsely represented at said sale that he was bidding for the family, and by means of this and other fraudulent representations induced other parties not to bid, and procured the property to be knocked down to him for a less sum than its value, was held to be a trustee *ex maleficio* for the parties thus defrauded.

We are of opinion that it was error to sustain the demurrer.

Decree reversed at the costs of the appellees and a procedendo awarded.

ADAM KERR, Defendant Below, v. F. W. AMES.

Where the receiver of a bank pays a dividend due to a creditor a second time, under the false impression that the creditor had never been paid the dividend due, the receiver can recover back the amount paid a second time.

Error to the Court of Common Pleas of Crawford county.

F. W. Ames, Receiver of the Petroleum Bank, paid to Adam Kerr, a creditor of the bank, two dividends, one of twenty and another of ten per cent. Subsequently, however, laboring under the impression that the second dividend of ten per cent. had not been paid to Kerr, he paid the dividend of ten per cent. a second time to him. The assets of the bank paid but thirty per cent. to the creditors, and upon discovering that Kerr had received ten per cent. more than was due him, the receiver brought the present action to recover back the amount paid by mistake. The facts, as well as the law, were submitted to the court upon the trial, and some of the assignments of error relate to admissions of evidence, but not having been touched upon in the opinion below, are omitted here.

For plaintiff in error, defendant below, *Messrs. Neill & Heywang.*

Contra, L. W. Wilcox, Esq.

Opinion by PAXSON, J. Filed January 9, 1882.

This cause was submitted to the learned Judge of the court below without the intervention of a jury. The assignments of error to his finding of the facts cannot avail the plaintiff in error. There was evidence to have submitted to a jury, and where that is the case we must accept his finding. Conceding the facts as found, his conclusions of law are not inaccurate. It appears that the plaintiff knew from at least one creditor that he was only entitled to the 30 per cent. which he had previously received; and further, that the payment of \$207 received by him on July 1, 1876, was not another dividend, but was a second payment of the 10 per cent. dividend made on January 1, 1872, and was paid under a mistake of fact, the receiver (plaintiff below) having forgotten that he had already paid this particular dividend on the 25th of January, 1872. The plaintiff in error has therefore no just cause of complaint in the fact that he is now required to refund this money. It would be against good conscience to retain it. It is true he had a right to demand his debt in full from the bank, and if the bank had paid it the case would have been different. But the receiver was not his debtor, and the money that was paid was not the money of the bank, but of the receiver. The latter had paid out all he had received of the assets of the bank, and this \$207 came out of his own pocket. It would be inequitable to allow the plaintiff in error to retain it. Authority is not needed for so plain a proposition.

Judgment affirmed.

RENICK v. BOYD.

An action of replevin for chattels which have become such by severance from the realty will not lie at common law by one out of possession of the realty against one in possession under claim of title.

The provisions of the Act of May 15, 1871, P. L., 268, authorizing the bringing of such action in such case for certain chattels do not extend to crops cut from the land.

Writs of error to the Court of Common Pleas of Chester county.

Replevin by J. Renick against J. Boyd to recover certain hay, oats and corn. Pleas, *non cepit* and property.

On the trial, before CLAYTON, P. J., the following facts appeared: The plaintiff had bought from the administrator of one Correy certain land in Franklin township, Chester county, of which defendant was in the actual possession. Defendant claimed the land as his own, and refused to give it up. Renick subsequently took actual possession of a part of the farm, and

planted and farmed it for a few months, but was forcibly dispossessed by defendant, who proceeded to harvest the crops. These actions were then brought to recover the crops which had been harvested. Meanwhile, an ejectment for the land in question had been brought by Renick against Boyd, and was pending at the trial of the replevin suits in the court below.

The court charged the jury, *inter alia*, as follows: "Under the evidence it clearly appears that at the time the grass, oats and corn were cut and harvested, the defendant was in actual, adverse possession of the land in dispute, by virtue of a claim of title; and, according to law, an action of replevin will not lie, under such circumstances, for the growing crops and products of land. * * *

"The defendant being in possession under a claim of right when the grass, oats and corn in dispute were cut and harvested, the plaintiff's remedy is in an action for damages. He cannot recover the thing itself, and your verdict should, therefore, be for the defendant in both cases."

Verdicts for defendants and judgments thereon. Plaintiff took these writs, assigning for error the charge of the court.

For plaintiff in error, *Messrs. Wm. M. Hayes and A. P. Reid.*

Contra, Messrs. C. H. Pennypacker and J. J. Gheen.

Opinion by GREEN, J. Filed February 20, 1882.

These were two actions of replevin brought to recover certain hay, oats and corn, after the same had been harvested, upon land of which the defendant was in the actual and adverse possession both before and at the time the crops were gathered. The plaintiff had brought an action of ejectment against the defendant to recover possession of the land, and this action was pending at the time the crops in question were severed from the freehold. The plaintiff claims that he is entitled to recover in this action under the provisions of the Act of May 15, 1871, P. L., 268. That act is as follows: "In all actions of replevin now pending or hereafter brought to recover timber, lumber, coal or other property severed from the realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute. *Provided* said plaintiff shows title in himself at the time of severance."

The learned judge of the court below held that this act was not intended to apply to the case of growing crops severed by the person in possession under claim of title to the land on which the crops were grown. In this opinion we concur.

Prior to the passage of the act in question it had always been held that replevin would not lie by one out of possession to recover against one in possession and claiming title, for any kind of chattels which had become such by severance from the freehold, of which they had previously formed a part. Thus, in *Brown v. Caldwell*, 10 S. & R., 114, it was held, that replevin does not lie by one not in the actual exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious, exclusive possession and occupation thereof, claiming the right for slates taken out of a quarry on the land.

In *Powell v. Smith*, 2 W., 126, in the application of the same doctrine, we held that replevin would not lie to recover fixtures separated and removed from a mill. On p. 127, GIBSON, C. J., said: "The principle which is to govern this case was settled in *Mather v. Trinity Church*, 3 S. & R., 509; *Baker v. Howell*, 6 Id., 476, and *Brown v. Caldwell*, 10 Id., 114, in which it was determined, on principle and authority, that the right of property in a chattel which has become such by severance from the freehold cannot be determined in a transitory action by the trial of the title to the freehold, because the title to land might otherwise be tried out of the county. An action of trover or replevin for such a chattel, therefore, does not lie by a plaintiff out of possession. * * * Independent of this technical inhibitory principle, which, however, is decisive, it would provoke much useless litigation, and be attended with great practical mischief, if an owner out of possession were suffered to harrass the actual occupant with an action for every blade of grass cut, or bushel of grain grown by him, instead of being compelled to resort to the action for mesne profits, after a recovery in ejectment, by which compensation for the whole injury may be had at one operation." Other authorities are to the same point.

The Act of 1871 has doubtless changed this rule, so far as it relates to the particular forms of property there mentioned. These are timber, lumber, coal and *other property*, severed from the realty. It is claimed that growing crops come within the designation, "*other property*," and therefore that the act includes them also. But a very slight consideration of the act shows not only that they are not expressly mentioned, but that they are not necessarily implied under this general description. There are many other forms of property besides timber, lumber and coal, which constitute part of the realty. Thus slate, marble, iron ore, zinc ore and all other forms of minerals and ores in place, building stone and fixtures, and machinery of every de-

scription, which have been permanently affixed to the realty. To all of these the expression "other property" in the act may well be applied. They are of the same generic character with the other kinds of property expressly mentioned. That is, they are a part of the realty itself, and when converted into personalty, it is by an act of severance, such as works a conversion of timber, lumber and coal. Now growing crops are only ephemeral. They are produced not by nature as a part of the land, but by the labor of man, combined with the operations of nature, and are never intended to become permanently affixed to the freehold, but to be removed from it at maturity. The very purpose of their cultivation is to make them personalty. Hence the spirit and meaning of the act in no sense requires that they should be considered in the same category with such constituent elements of the earth as timber, lumber and coal. In *Allen's Appeal*, 32 P. F. Smith, 302, the words of an act giving a preference for wages to persons employed "in any works, mines, manufactory or other business," etc., were construed to apply only to any other business, *ejusdem generis*. The same rule of construction applied here would exclude growing crops as not being of the same kind or class with those expressly named in the act. We consider that the purpose of the act was to remedy a different kind of evil which existed prior to its passage. Formerly, when one in possession cut down standing timber, or severed or removed coal, slate, ores or minerals from the realty, the only remedy of the true owner was by the action for mesne profits, or by estrepement or other proceeding to stay waste. But these were not adequate, as the tenant in possession could make way with and convert these articles, and being insolvent, a verdict and judgement for damages, or a mere preventive order staying future acts, furnished no sufficient relief, and we apprehend it was the purpose of this act to remedy this class of wrongs. These considerations are inapplicable, however, to the case of growing crops. They are generally the fruits of the labor of the tenant in possession, and it would be a most serious innovation upon the existing state of the law, as well as a great hardship upon the person in possession under claim of title, to subject him to a succession of actions for his various crops when harvested, and to the necessity of trying complicated and vexatious questions of title to land, in the determination of the ownership of his fruits, vegetables and crops.

Such a construction is not required by any reading of the act, and is, therefore, not necessary to be made.

Judgment affirmed.

**THE BIRMINGHAM INSURANCE COMPANY,
Defendant Below, v. J. F. KRONK et al.**

In an action upon a policy of insurance the affidavit of claim averred "that due notice of said fire and loss was given to said company at once, and the agents thereof visited and examined the same," in response to which the affidavit of defense set forth that "the defendant corporation has never had any proof of any loss of any of the goods mentioned in said policy, such as is required by the terms and conditions of said policy." *Held*, not to be a denial of notice of the fire, and that the averment was properly admitted in evidence.

Two persons submitted proofs of loss under a policy in the name of a third person. The proofs stated that the property insured belonged to them and to no other person. The officer of the company receiving the proofs remarked that "the papers were all right." "We had nothing insured," and that they would not pay. *Held*, to be ample evidence of a waiver of preliminary proof.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

In April, 1875, the Birmingham Fire Insurance Company issued its policy of insurance in favor of Caroline Kronk and C. Conway on certain personal property. A few days afterwards C. Conway, with the consent of the company, assigned his interest in the policy to Mrs. Kronk. It appeared in evidence that Mrs. Kronk had made purchase of the property insured with money loaned to her by Adam Bonscheiner, the use plaintiff. To secure Bonscheiner Mrs. Kronk and her husband made a bill of sale of the goods to Bonscheiner, the goods, however, remaining in the custody of Kronk and wife. Kronk and wife, with Bonscheiner, then went to the office of the insurance company for the purpose of having the policy transferred to Bonscheiner, and were informed that it would be all right, there would be no trouble. The policy was not actually transferred for the reasons given by the officers of the company at the time the visit was made, that the record of the policy could not be found just then. Subsequently the property insured was burned, and Kronk and Bonscheiner served a notice of loss, called a preliminary proof of loss, upon the company, in which they swore that the property insured belonged to Adam Bonscheiner and John F. Kronk, and that no other person had any interest in said property. The secretary of the company upon receiving this proof of loss remarked that "the papers were all right." "We had nothing insured," etc., that they would not pay, and this action was brought to recover the amount of the policy.

The affidavit of claim averred "that due notice of said fire and loss was given to said com-

pany at once, and the agents thereof visited and examined the same."

In answer to this allegation the affidavit of defense set forth that "the defendant corporation has never had any proof of loss of any goods mentioned in said policy, such as is required by the terms and conditions of the said policy."

Upon the trial the portion of the affidavit of claim above quoted was offered in evidence for the purpose of proving notice of the fire to the company, not denied by it in its affidavit of defense.

The notice of loss and conversation of the secretary of the company at the time were also offered as evidence of a waiver of preliminary proof. Both these offers were admitted under exceptions by the plaintiff in error and form the subjects of the only assignments of error reviewed.

For plaintiff in error, defendant below, *Messrs. Robb & Fitzsimmons* and *Hon. Thos. M. Marshall*.

Contra, Messrs. W. C. Moreland and Hampton & Dalzell.

PER CURIAM. Filed October 17, 1881.

There was no denial of notice of the fire in the defendant's affidavit, and the court therefore rightly admitted the first sentence in the fifth averment of the affidavit of claim. Notice of the fire and proof of loss were clearly two distinct things in the conditions of the policy. We think there was ample evidence of waiver of preliminary proof admitting that no such proof were furnished, and the refusal by the court of the defendant's first point was entirely right. The case was properly submitted to the jury.

Judgment affirmed.

Court of Common Pleas, Luzerne County.

ROTHSCHILD BRO'S v. McGRATH.

In an action upon a promissory note given for the purchase of liquors, where the defense is adulteration, the proofs of such adulteration must be "clear, precise and convincing."

"The article in question having been inspected, and gauged and stamped by United States officers as whisky of the requisite proof, some counter-proof of the most satisfactory kind is required to impeach its good character."

The referee in this case reported that, so far as practicable, he attached to his reports the exhibits offered in evidence, but that certain exhibits contained in bottles (samples of liquor) would remain in his custody "until wanted in court." Held, that while there was possible error in the supposition of the learned referee that, in any event or contingency, those samples

could ever "be wanted in court," the error was not so palpable or material as to require reversal on that ground.

The report of a referee in a case of this kind will not be reversed for alleged error in fact, unless the samples are produced *in ore fore*, and the error, if any, thereby made palpable to the court. The maxim, *de bibendis, a bibendo judicatur*, applied.

The referee has legal discretion to make final disposition of the retained exhibits. With the exercise of that discretion, the court will not interfere, at least in a judicial capacity.

Exceptions to report of referee.

Opinion by WOODWARD, J.

The promissory note sued upon was given by the defendant to the plaintiffs in payment for a bill of liquor. The defense was failure of consideration, in that the liquor was not good and pure; but, on the contrary, was mixed, impure and adulterated. The learned referee, after hearing all the testimony, and having ample opportunity to apply to the liquor offered in evidence the test of personal experiment, has found, as matter of fact, that "the proofs offered by the defendant are not of that clear, precise and convincing kind that they should be to prevail." In other words, the referee applies to this alleged whisky the familiar legal principle of the reasonable doubt; that is, the article in question having been inspected, and gauged and stamped by United States officers as whisky of the requisite proof, some counter-proof of the most satisfactory kind is required to impeach its good character. We think the referee was right. He has been prudent enough to retain the exhibits offered in evidence in his own possession, to some extent at least, as will appear from the following extract in his report: "Running through the testimony are a number of exhibits, which, as far as practicable, the referee attaches hereto. Those not attached are in bottles (samples of liquor), and will remain in the custody of the referee until wanted in court, or the case is disposed of." It is possible the learned referee may have erred in supposing that, in any event or contingency, these samples could ever "be wanted in court." We do not reverse, however, for the erroneous finding of immaterial facts. The error must be palpable. In this case there can, of course, be no error palpable to the court for the reasons so well stated by the referee. He can now exercise his own discretion in making final disposition of the retained exhibits.

The exceptions are dismissed, and the report of the referee is confirmed.

For plaintiffs, *Messrs. Palmer, Dewitt & Fuller*.

Contra, E. A. Lynch, Esq.

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ERRATA.

Page 71, 1st col., 14th line from top should read "does not change the liability unless it is further shown," etc.

Page 271, 2d col., 29th line, for "impossible" read "improbable."

Page 286, 1st col., 2d line of syllabus, for "landing" read "lading."

Page 375, 1st col., 10th line of syllabus, for "intimation" read "intimidation."

